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DEC 13

Nos. 403 and 404

In the Supreme Court of the United States

OCTOBER TERM, 1935

GEORGE ASHWANDER ET AL., PETITIONERS,

v.

TENNESSEE VALLEY AUTHORITY ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY

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NOS. 403 AND 404

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY

OPINIONS BELOW

The opinion of the District Court (R. 376) is reported in 9 F. Supp. 965, and its opinion on a preliminary motion to dismiss (R. 289) in 8 F. Supp. 893. The opinion of the Circuit Court of Appeals (R. 1302) is reported in 78 F. (2d) 578.

JURISDICTION

The judgment sought to be reviewed was entered July 17, 1935 (R. 1311). The petition for writs of certiorari was filed August 28, 1935, and granted on October 14, 1935. The jurisdiction of

this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

No. 403

1. Whether, in the absence of fraud, duress, negligence, or inadequacy of consideration, minority stockholders may sue to annul a contract of their corporation with the Tennessee Valley Authority upon the ground that the contract is beyond the constitutional powers of the Tennessee Valley Authority.

2. Whether the Federal Government may dispose of the surplus water power necessarily created by Wilson Dam and may authorize generation of electric energy and acquisition of transmission lines as means of facilitating this disposal.

No. 404

1. Whether, in the circumstances of this case, the Circuit Court of Appeals committed reversible error in sustaining the refusal of the District Court to grant a declaratory decree.[1]

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[1] No. 403, the main case, concerns the right of the Government to sell electric energy generated at Wilson Dam. In No. 404, petitioners seek a declaratory decree as to possible future competition upon the expiration of the contract and as to future activities of the Authority in relation to dams under construction or not yet begun. This question is discussed separately, *infra* at 161.

STATUTE INVOLVED

The provisions of the Tennessee Valley Authority Act are set forth in Appendix A, separately printed.

Of particular relevance are the following provisions dealing with the basic purposes of the Act:

> [SEC. 1.] That for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is hereby created a body corporate by the name of the "Tennessee Valley Authority" (hereinafter referred to as the "Corporation"). The board of directors first appointed shall be deemed the incorporators, and the incorporation shall be held to have been effected from the date of the first meeting of the board. This Act may be cited as the "Tennessee Valley Authority Act of 1933."
>
> SEC. 4. Except as otherwise specifically provided in this Act, the Corporation— * * *
>
> (j) Shall have power to construct *such* dams *and* reservoirs *in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under con-*

struction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines. *The directors of the Authority are hereby directed to report to Congress their recommendations not later than April 1, 1936, for the unified development of the Tennessee River system.* (Amended portion in italics.)

SEC. 9a. The board is hereby directed in the operation of any dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the board is authorized to provide and operate facilities for the generation of electric energy at any such dam for the use of the Corporation and for the use of the United States or any agency thereof; and the board is further authorized, whenever an opportunity is afforded, to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power

as in this act provided, and thereby, so far as may be practicable, to assist in liquidating the cost or aid in the maintenance of the projects of the Authority. (Added by amendment.)

SEC. 23. The President shall, from time to time, as the work provided for in the preceding section progresses, recommend to Congress such legislation as he deems proper to carry out the general purposes stated in said section, and for the especial purpose of bringing about in said Tennessee drainage basin and adjoining territory in conformity with said general purposes (1) the maximum amount of flood control; (2) the maximum development of said Tennessee River for navigation purposes; (3) the maximum generation of electric power consistent with flood control and navigation; (4) the proper use of marginal lands; (5) the proper method of reforestation of all lands in said drainage basin suitable for reforestation; and (6) the economic and social well-being of the people living in said river basin.

The following provisions deal with the disposal of surplus power:

SEC. 10. The board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the board is author-

ized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided,* That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the board to cancel said contract upon five years' notice in writing, if the board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: *Provided further,* That the board is hereby authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or re-

search institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region: *Provided further, That the board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the board: Provided further, That in order to supply farms and small villages with electric power directly as contemplated by this section, the board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: And provided further, That the terms "States", "counties", and "municipalities" as used in this Act shall be construed to include the public agencies of any of them unless the context requires a different construction.* (Amended portion in italics.).

SEC. 11. It is hereby declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein pro-

vided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further hereby declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this Act.

SEC. 12. In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. * * *

STATEMENT

The contract in issue was made between the Alabama Power Company and the Tennessee Valley

Authority on January 4, 1934.[2] In minor respects it was amended and supplemented on February 13, 1934, and May 24, 1934 (R. 154, 512). The contract provides for the acquisition of transmission lines extending from Wilson Dam to the nearby wholesale market. These transmission lines are not now connected with any other dam, interconnection is unnecessary, and more than sufficient electric energy is available at Wilson Dam to serve the lines (Fdg. 120, R. 1074).

The contract, after recitals of mutual benefits, contained the following material provisions (R. 133–151):

> (1) An agreement by the Alabama Power Company to sell to the Authority certain transmission lines (and their auxiliary electrical properties) extending from Wilson Dam to the surrounding territory in northwestern Alabama, together with certain real property in the area known as the Joe Wheeler Dam Site (upon which the Author-

[2] The contract was one of a group made concurrently by the Tennessee Valley Authority with the Commonwealth & Southern Corporation and four of its subsidiaries, the Alabama Power Company, the Tennessee Electric Power Company, the Mississippi Power Company, and the Georgia Power Company. The other contracts of the group, although contained in the same general document, were considered as independent in both courts below and are not involved in this suit. The contracts with the Mississippi and Georgia companies have been performed, and the properties conveyed by the Mississippi company are presently being used in the disposal of Wilson Dam power to various municipalities and local cooperatives (R. 961).

ity is now constructing Wheeler Dam), such properties to be delivered to the Authority, upon its request, for a purchase price of $1,150,000.

(2) A so-called interchange agreement under which the Power Company agreed to deliver over its own transmission lines an equivalent of energy received from the Authority to supply the Authority's demand, and under which the Authority in addition agreed to deliver to the Power Company on demand all of its "surplus power" in excess of the energy interchanged to satisfy the Authority's own demand.[3]

(3) An agreement between the two parties for a territorial division of their services, including an agreement by the Authority not to sell energy in the area outside that served by the transmission lines in suit.

The interchange and territorial provisions were to terminate December 31, 1938, or three months after the completion of the Norris Dam power plant, whichever should be earlier. Pursuant to this agreement, the Power Company has purchased "surplus power" during the first six months of the contract amounting to about 150,000,000 kwh. (See Annual Report of Tennessee Valley Authority, fiscal year ending June 30, 1934, p. 28.) The interchange agreement has been continuously performed to the present time (R. 961).

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[3] The Authority further agreed to reserve at all times for the use of the Power Company and its affiliates 20,000 kw. of capacity, the Power Companies to pay monthly $16,200.

Seven months after the contract had been executed and partially performed, certain of the petitioners demanded that the board of directors repudiate the contract (R. 481). This the directors refused to do (R. 488).

The considerations which moved the Power Company to enter into the agreement and to decline to disaffirm it are clearly set forth in the Record. The management concluded that it was in the best interests of the Company, which controlled the territory surrounding the dam, to contract with the Authority for the transfer of the transmission lines in a small area for a consideration, upon condition that the Authority agree not to sell outside that area during the life of the contract. The management exercised its discretion only after careful consideration. It declined to express any opinion as to the legality of the Tennessee Valley Authority Act (R. 488–491).

On September 13, 1934, this suit was brought in the Circuit Court for the Eighth Judicial Circuit of Alabama by fourteen preferred stockholders of the Alabama Power Company, holding approximately eleven hundred of the 367,207 outstanding preferred shares, against the Power Company, the Tennessee Valley Authority, its three directors individually, the Electric Home and Farm Authority, Inc., the Chemical Bank and Trust Company, and the Guaranty Trust Company of New York, as trustees, respectively, under existing mortgages of

the Power Company, and eighteen municipalities of Alabama (R. 1–3, 10) now served by the transmission lines in suit. The suit was removed to the District Court for Northern Alabama on petition of the Authority (R. 217). The bill of complaint, which occupies without exhibits ninety-nine pages of the Record, alleged, *inter alia:* that the Tennessee Valley Authority Act was unconstitutional (R. 30, 31); that the contract of January 4 was in furtherance of illegal objectives (R. 36–38); that the contract was induced by duress (R. 4, 15, 36, 46, 53); that the consideration for the properties to be transferred by the Power Company was inadequate (R. 43, 85); that the Authority was threatening to engage in illegal competition with the Power Company (R. 4, 34–35); and that the directors and stockholders of the Power Company had refused upon demand to bring suit to annul the contract and to enjoin the Authority from the activities complained of (R. 86–88).[4] The bill prayed, in twenty-seven numbered paragraphs, that the contract in question be annulled; that the Power Company and the mortgage trustees be enjoined from transferring the properties pur-

[4] The bill of complaint made numerous references to an option contract of August 9, 1934, between the Alabama Power Company and the Tennessee Valley Authority for the purchase by the latter of certain urban distribution systems. This option was terminated before the final hearing in this case (Fdg. 12, R. 1037). Consequently, it was not before the District Court on final hearing, was not in issue before the Circuit Court of Appeals, and is not here in issue.

suant to the contract; that the defendant municipalities be enjoined from entering into or executing any agreement with the Authority for the purchase of electricity; and that various aspects of the "plan and program of the Authority" be declared invalid (R. 90–98).

The bill of complaint was attacked in the District Court, by appropriate motion, for prolixity, multifariousness, and misjoinder, as well as for want of equity, and on the ground that the petitioners were not entitled to maintain this suit (R. 271, 273). The District Court, although denying the motions, rendered an opinion (R. 289) limiting the issues of the case to the validity of the contract of January 4, 1934, between Alabama Power Company and the Authority (R. 291). Referring to this ruling, the District Judge said:

> * * * I told counsel that, while the bill contained many things, the only one that I would regard would be the validity of the contract or transaction between the Alabama Power Company, which the preferred stockholders are assailing, and the Tennessee Valley Authority. That is to say, the contract conveying the transmission lines, and making certain arrangements about the interchange of power (R. 377).

The District Court further limited the issues by ruling that the bill did not make a showing of fraud, negligence, or duress in the making of the contract, stating:

> There is no showing that the management of the Alabama Power Company were guilty

> of fraud, oppression, or gross negligence. They are shown to have acted in good faith and because they thought the transaction with the Tennessee Valley Authority was in the interest of the Alabama Power Company.
>
> It is not shown that the management of the Alabama Power Company, in the transaction with the Tennessee Valley Authority, acted under legal duress (R. 289–290).

The District Court entertained the stockholders' suit on the sole ground that, "though it [the Company] was authorized to sell the property" (R. 291), the contract for the purchase and sale of the transmission lines was *ultra vires* the Alabama Power Company because in furtherance of illegal and unconstitutional objectives of the Authority (R. 291).

Answers were thereafter filed by several defendants, including the Authority, denying the material allegations of the bill (R. 333). Subsequently the petitioners filed an amended and supplemental bill of complaint, praying that a declaratory decree be given adjudging the statutory and constitutional power of the Authority to perform various enumerated activities, in particular the sale of power wherever generated to be used or resold in competition with the Alabama Power Company; and that the defendant municipalities be enjoined from entering into or performing any contract with the Public Works Administration or any other federal agency for a loan or grant of funds for the construction or acquisition of an electric

utility distribution system to be supplied with power transmitted by or sold for the account of the Tennessee Valley Authority (R. 1283–1288).

The case was heard on extensive testimony relating to the purposes and functions of Wilson Dam and the three other dams now under construction by the Authority, and to the nature of its present and prospective activities in the disposition of surplus power. In accordance with the ruling of the District Court on the motion to dismiss, the court refused to try any question as to the adequacy of the consideration or as to the rates to be charged for power generated by the Authority (no error being assigned by petitioners as to these rulings).

At the close of the evidence the District Court rendered an oral opinion, holding that the Authority proposed to utilize the properties described in the contract for the purpose of marketing amounts of electric power in excess of that produced unavoidably in an effort to limit the production to that necessary for serving government properties (R. 376). The court held that, in authorizing the sale of "surplus power", the Act must be construed to authorize the sale of only the surplus unavoidably produced in an effort to supply government properties alone, and that, if construed to authorize the conversion of all the available water power into marketable electric energy, the provision would be unconstitutional. The decree of the District Court annulled and enjoined performance of the contract of January 4, 1934, between the Authority and the

Power Company [5] (R. 382). The court declined, however, to grant any declaratory relief (R. 1101). Six weeks later, findings of fact and conclusions of law were entered (R. 1035).

The Authority, its directors, the Electric Home and Farm Authority, Inc. (since dissolved), and the City of Florence appealed from the decree (R. 1183, 1173). The case was severed as to the other original defendants (R. 1183), and they are not before this Court in No. 403. The petitioners thereafter filed a cross-appeal which is No. 404 in this Court, alleging as error the failure of the District Court to grant a declaratory decree (R. 1293). In the cross-appeal all the original defendants were joined as cross-appellees.

The Circuit Court of Appeals reversed the decree [6] of the District Court, except as to its refusal

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[5] In addition, the decree enjoined the defendant municipalities from entering into or performing any contract with the Tennessee Valley Authority for the purchase of energy from it, and restrained the municipalities from accepting or expending any funds from the Tennessee Valley Authority or the Public Works Administration or any other agency of the United States, for the purpose of constructing a distribution system for electric power to be supplied by the Tennessee Valley Authority. The contract of January 4 is not dependent upon the contracts with municipalities. The decree also annulled the contract of the Electric Home and Farm Authority, Inc., with the Alabama Power Company, dated May 21, 1934. These contracts were annulled because of their alleged relation to the main contract of January 4, 1934. See opinion of February 11, 1935 (R. 371); opinion of November 12, 1934 (R. 291, 292).

[6] The Circuit Court of Appeals withheld its mandate pending disposition of this appeal.

to grant a declaratory decree (R. 1302 *et seq.*). The court ruled that "the right to erect and maintain it [Wilson Dam], in the exercise by Congress of the War and Commerce Powers conferred upon it by the Constitution, is so clear that it is conceded." The court held that by virtue of the ownership of the dam the Government enjoyed the right to dispose of the power "inevitably created by the construction of that dam." Observing that the water power "must be either converted into electricity and used up as it is released from storage or allowed to go to waste", the court concluded that the unused surplus energy could be converted and sold. The court further concluded that "it is within the province of Congress to adopt any reasonable means, whether of lease or sale, for disposing of the surplus. The use of transmission lines to facilitate sales cannot fairly be said by the courts to be unreasonable or inappropriate."

The basic facts

Wilson Dam and the other Muscle Shoals properties were constructed or acquired pursuant to Section 124 of the National Defense Act of 1916 (39 Stat. 166, 215) at a cost of $136,902,000 (Def. Ex. 8, R. 707). They include chiefly a processing plant for the production of certain war materials known as Nitrate Plant No. 2, the Wilson Dam including the hydroelectric power plant, and the auxiliary Sheffield steam plant. The dam site, to-

gether with all riparian rights, was sold to the Government by the Muscle Shoals Hydroelectric Power Company.[7] Construction of the dam and the other properties was begun in 1917 (R. 709). The dam and power installation of eight generators were completed in 1926 (R. 836). In addition to furnishing electric power for national defense operations, Wilson Dam improved navigation over the Muscle Shoals rapids for a distance of some fifteen miles and was the only feasible means of eliminating this most serious obstruction to navigation on the Tennessee River (Fdg. 131, R. 1082), which had been a matter of national concern for more than a century (R. 708). Until the enactment of the Tennessee Valley Authority Act these properties at Muscle Shoals remained idle except for the operation of the dam for the improvement of navigation on the Tennessee River and the generation of a portion of the available energy by the War Department for governmental use and sale to the Alabama Power Company (Fdgs. 172, 173, R. 1089–1090).

As an inevitable result of the impounding of waters of the Tennessee River by Wilson Dam and the natural flow of water over that dam, there has been continuously created a large quantity of power. The Record shows the available power at Wilson Dam, the amount sold to the Alabama Power Com-

[7] See copies of deeds, Hearings before the Senate Committee on Agriculture and Forestry, 67th Cong., 2d Sess. 191–193.

pany and the available power not used for the period from 1926 to the date of the enactment of the statute (R. 957; Def. Ex. 97, R. 958).[8] During this entire period the Alabama Power Company was the only purchaser of, and, with its affiliate, the Tennessee Electric Power Company, the only party capable of purchasing power at the dam (Def. Ex. 98, R. 962; R. 1023). Throughout these years large quantities of the surplus have been wasted; in every year except one the amount of potential electric power so wasted has been far in excess of the total used and sold (Def. Ex. 97, R. 958). The continued idleness of the Muscle Shoals properties as a whole, the annual waste of great quantities of unused power at Wilson Dam, and the monopolistic position of the Alabama Power Company with respect to this power presented a vexatious legislative problem for many years (R. 706–712). After full and extended consideration over a period of many years of various proposals for the utilization of these properties

[8] The figures on Def. Ex. 97, R. 958, are as follows:

Year	KWH Available	KWH Generated	KWH Not Used	KWH Sold
1926	936, 300, 000	439, 379, 300	496, 920, 700	432, 629, 000
1927	763, 500, 000	565, 609, 500	197, 890, 500	557, 025, 000
1928	1, 339, 400, 000	222, 096, 800	1, 117, 303, 200	216, 859, 000
1929	1, 349, 000, 000	171, 681, 600	1, 177, 318, 400	165, 821, 000
1930	801, 200, 000	306, 119, 200	495, 080, 800	299, 260, 000
1931	836, 600, 000	345, 603, 400	490, 996, 600	339, 424, 000
1932	1, 141, 900, 000	288, 638, 000	855, 262, 000	280, 619, 000
1933	960, 400, 000	287, 862, 300	672, 537, 700	280, 844, 000

184,000 KW Capacity, 630,860 CFS per day; 1 sec. ft. (7 KWH), 4,416,000 KWH per day; 1,611,840,000 KWH per 365 days.

and various inconclusive efforts to solve the problem, Congress enacted the Tennessee Valley Authority Act. (See Appendix F for chronology of legislative action concerning Muscle Shoals properties.)

The purposes of the Act are declared in Section 1 to be to maintain and operate the Muscle Shoals properties in the interest of national defense and for agricultural and industrial development, to improve navigation on the Tennessee River, and to control the destructive flood waters in the Tennessee River and Mississippi River basins. The Act conferred upon the Authority the power to control and operate the properties at Muscle Shoals, and authorized experimental and other peace-time operations to maintain the properties for national defense purposes (Sections 5, 7, 20). To prevent the continued waste of surplus power necessarily created at Wilson Dam and to assist in liquidating the cost of the project Congress authorized the Authority to sell the surplus power and transmit it to purchasers in the surrounding territory (Sections 9a, 10, 12). These sales of surplus power were to be in accordance with the declared policy of the Act (Sections 10, 11), to make as widespread distribution of the benefits of the power as possible, to give preference to states, counties, municipalities, and cooperative organizations of citizens or farmers not organized or doing business for profit (Section 10).

Authority was conferred to purchase or construct transmission lines "in order to place the board upon a fair basis for making such contracts and receiving bids for the sale of such power" (Section 12).

The Authority has administered the Act in accordance with the terms and policy of the statute. Extensive experiments have been undertaken in the production and use of nitrates, phosphoric acid, and other materials valuable for war purposes (R. 898–899, 926). Such activities serve to maintain the plants in readiness for war purposes (R. 932–937) and to develop a trained personnel essential to the operation of the plants in time of war (R. 926). These operations, together with the operation of the navigation facilities and government properties, require a continuous generation and use of some electric energy (Fdg. 54, R. 1050; Fdg. 164, R. 1088; R. 958–959). A transmission line, two miles long, connects the dam and the nitrate plant. A part of the energy from the dam servicing the lines in suit goes out from the substation at the nitrate plant.

The defendant municipalities, together with others, for many years have been seeking legislation enabling them to buy Wilson Dam electric energy directly from the Government (R. 934; Fdg. 171, R. 1089). All of these municipalities are located within a radius of about fifty miles from Wilson Dam, and the boundaries of three of them,

namely, Sheffield, Florence, and Tuscumbia, practically touch the Muscle Shoals reservation (Fdg. 167, R. 1089). The franchises of the Alabama Power Company in these three cities expired in 1933 (Fdg. 169, R. 1089). For nine years the Alabama Power Company has been buying surplus electric energy at the dam and reselling it to these municipalities, making delivery over the lines in suit. Delivery of electric energy by the Authority to any of them would require these or substantially duplicating transmission lines (R. 960). Immediately after the passage of the Act, numerous municipalities, including the defendants, made tentative application to the Authority for power direct from Wilson Dam (R. 585). Accordingly, on January 4, 1934, the Authority and the Power Company entered into the contract in suit.

Scope of the substantive issue

Petitioners assert that this case involves numerous and broad issues. We respectfully reiterate that the sole substantive question is whether the Federal Government may dispose of the surplus water power necessarily created by Wilson Dam and may authorize generation of electric energy and acquisition of transmission lines as means of facilitating this disposal.

That this is the only issue presented is demonstrated by the distinctive character of Wilson Dam and by the finding of the District Court that the hydroelectric power continually available at Wil-

son Dam is sufficient to supply the needs of the area (R. 621; Fdg. 120, R. 1079).

Extraneous issues raised by petitioners

1. *The "power program."*—From miscellaneous press items, speeches and announcements by various officials and the several agencies of the Government, petitioners have constructed what they term a "nation-wide power policy" (brief, pp. 6–21). They suggest that the validity of the Authority's operations depends upon the constitutional character of the various activities of the agencies referred to. Suffice it to say that the constitutionality of the activities of the Authority is concerned only with the Tennessee Valley Authority Act with its own independent and distinctive legislative background.

Nor does this case involve the validity of the "electricity plan and program" of the Authority which, as described by petitioners, involves dams under construction, proposed dams, interconnections yet unmade, and future sales of power from those dams (brief, pp. 21–37). The propriety of a declaratory decree with respect to such conjectural activities is considered hereinafter in No. 404.

The Authority has begun the construction of Norris (Cove Creek), Wheeler, and Pickwick Landing Dams, together with a transmission line between Norris and Wilson. These dams are not only related to, but, as the trial court found, are essential to the improvement of navigation on the

Tennessee River and the control of destructive flood waters in the Tennessee and Mississippi River basins (Fdg. 146, R. 1084; Fdg. 157, R. 1087; R. 740, 774, 806, 824, 846). Only two generating units are included in the plans for Norris, two at Wheeler, and none at Pickwick (Fdgs. 149, 150, R. 1085). The Norris power plant will be operated only during the low-water season when water is being released to increase the river depth downstream (R. 964, 966, 832, 833). The statutory authority to construct these dams and appurtenant works is derived from Sections 4 (j), 17 and 18. Their history and functions are discussed in greater detail in connection with No. 404 (*infra* at 168). Since the trial, construction of certain other dams has been authorized by Congress (Pub. No. 260, 74th Cong., Title II). These proposed dams are integral units of the project for the development of a nine-foot channel and the control of flood waters.

2. *Steam plants.*—Special emphasis is laid by petitioners upon the question whether Congress can authorize a steam plant to be operated commercially. (See brief, pp. 6, 15, 29, 49–52, 56, 62, 102, 111, 189–192.) That question is not involved in this suit, since no such plant is being operated at all. The supply of continuous firm power from Wilson Dam is ample (Fdg. 120, R. 1079). Petitioners' evidence goes merely to the existence of capacity rather than to any plan for use. Apparently they take the position that they are entitled to declara-

tory relief adjudging any possible future use illegal. (See brief, pp. 189–192.)

The omission of the consideration of steam plants by the Circuit Court of Appeals and the District Court cannot be ascribed to mere inadvertence. The evidence on this subject is that there is included among the Muscle Shoals properties taken over by the Authority a large steam electric plant, auxiliary to Wilson Dam, which has remained virtually idle since its completion (R. 707). This steam plant was originally erected to furnish power for the nitrate plant prior to the completion of Wilson Dam. Prior to 1933 it had been under lease for a number of years to the Alabama Power Company (Annual Report of Tennessee Valley Authority, fiscal year ending June 30, 1934, p. 24). The Authority acquired two small stand-by steam boilers in Mississippi as an incident to the purchase from the Mississippi Power Company of certain transmission properties in that state, since the Company had no further use for them. These are not included in the contract with the Alabama Power Company, and are not intended for use to supply electric power in Alabama. They are shut down and are not intended for use anywhere except possibly in temporary emergency (R. 962, 965). There is no evidence in this Record that either the auxiliary plant at Wilson Dam or the small boilers in Mississippi will be used in connection with the properties here involved.

3. *Purchase of power for resale.*—No question as to the right of the Authority to purchase electric energy for resale is involved in this suit (*cf.* brief, p. 53).

The Authority has not purchased and is not purchasing any power for resale (R. 962). Petitioners refer to a proposed temporary arrangement under a contract the performance of which was never begun and which is no longer in existence (R. 569, 964). The arrangement which is in existence and which has been continuously performed under the contract of January 4 is a so-called interchange agreement by which the Authority is enabled to deliver power on the lines of the Alabama Power Company at the dam and receive in turn at more distant points, such as the Mississippi state line, an equivalent amount of power less losses in transmission (R. 961). Thus, such an interchange, far from being a purchase of power, is rather a means of disposing of power (R. 621, 962). Such an agreement obviously differs from the ordinary interchange agreements of private utilities in which the power companies purchase power in low-water season to supply a demand for which they have inadequate capacity. The only function of the so-called interchange in the January 4 contract is to provide a means of selling the available power at Wilson Dam by use of the transmission lines of the private utilities. The only provision for purchase of power is contained in paragraph 8 of the agreement, whereby the Authority agrees to *sell* to the Power Companies on demand its "surplus power"

not needed to serve the Authority's own demand, for which the company pays a minimum charge of $16,200 per month (R. 140, 146). It is significant that the contract contains no correlative obligation upon the Power Companies to supply Authority with such surplus power.

4. *Distribution systems.*—The question as to the right of the Authority to operate urban distribution systems is not before the Court (*cf.* brief, pp. 13, 19–20, 23, 27–30, 39, 40, 42, 44–48). As has been pointed out (*supra* at 12), the option for the systems in the municipalities to be served by the transmission lines in suit was cancelled. The only system that may be in any way treated as a distribution system is a small one in Athens, Alabama, not connected with the municipality system there, which serves only three or four customers (R. 479). The small system at Belle Mina, Alabama, is comparable to the other rural lines involved in the contract of January 4 and is incidental to the transmission lines in suit (R. 964, 978, 979). It covers a sparse territory, includes rural supply lines, one transformer, and a straggling operation (R. 978). Both of these systems were purchased because the acquisition of the transmission lines isolated them from other power company property (R. 479). The Authority has no plans for the purchase or operation of urban distribution systems.

As already pointed out, the sales of the surplus power were to be made in accordance with the de-

clared policy of the Act (Sections 10, 11), to make as widespread distribution of the benefits of the power as possible, "particularly [to] the domestic and rural consumers to whom the power can economically be made available" (Section 11). "In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines," Section 10 provides that:

> * * * the board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable. * * *. *Provided further,* That in order to supply farms and small villages with electric power directly as contemplated by this section, the board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: * * *

5. *Possible bond issues and loans.*—Petitioners repeatedly complain of the mere existence of the Authority's statutory right to issue bonds (Sections 15, 15 (a)) and to make loans (Section 12 (a)). As with the charges of steam-plant operations, petitioners endeavor to draw substance to the complaints by sheer force of assertion and repetition. Suffice it to say that the Record does not and

cannot disclose any plan to exercise the rights under these sections.

6. *State regulatory powers.*—Petitioners maintain that the activities of the Authority in contracting with the municipalities constitute a displacement of the regulatory powers of the State of Alabama over its public utilities (brief, pp. 34–37, 175–179). While the contract of January 4 is not dependent upon these contracts, it should be noted that clearly there is no interference with the powers of the State of Alabama, for the state legislature has expressly authorized the contracts of the municipalities, and the Supreme Court of Alabama has held that this legislation is not an abandonment but a retention of the regulatory powers of the state. *Oppenheim* v. *City of Florence,* 229 Ala. 50, 155 So. 859. This subject, together with recent statutes, is discussed *infra* at 150.

7. "*Yardstick.*"—The petitioners contend further that the activities of the Authority are invalid because they have been undertaken for the purpose of setting up a yardstick for privately owned utilities (see brief, pp. 21–23, 159–164). The statute, as originally enacted, contained no reference to this conception and as amended provides for the accurate assembling of information by the Authority on the subject of costs of electric power, such information to be made available to federal and state agencies (Section 14, as amended). This function is obviously informational, not regulatory. The

District Court made no finding concerning the purposes of Congress in enacting the statute, and the stated purposes of the Act and their history are inconsistent with any conclusion that the motives of Congress were not legitimate. In administering the Act, the Authority has adhered to its terms. The District Court made no finding concerning the dominant or primary motive of the directors, and the assertion of the petitioners to the contrary is inaccurate (Fdgs. 70, 71, R. 1059–1061; *cf.* brief, p. 22). The District Court did enumerate nine objectives as constituting the policy of the Authority in that phase of its activity concerned with the disposal of surplus power. While these objectives do not relate primarily to the contract of January 4, they are treated more fully *infra* at 154, 158. These findings in no way relate to the purpose of the construction of Wilson Dam, which was established for navigation and war purposes. Nor do they in any way relate to the motives of the directors in constructing Norris, Wheeler, and Pickwick Dams, which, as the District Court found, are not only related to but are of the type *indispensable* to the promotion of navigation and the control of floods on the Tennessee and Mississippi Rivers (Fdgs. 146, 157, R. 1084–1085, 1087).

SUMMARY OF ARGUMENT

I

The petitioners as minority stockholders have no standing to maintain this suit. In the first place, they are estopped to assert a cause of action on

behalf of their corporation, the Alabama Power Company. That Company has purchased Wilson Dam electric energy from the United States since 1926, continuing its purchases after the enactment of the Tennessee Valley Authority Act in May 1933, and later pursuant to the contract of January 4, 1934. These purchases were wholly voluntary. One who thus accepts the benefits of a statute is estopped to assert that it is invalid. *Great Falls Manufacturing Co.* v. *Attorney General,* 124 U. S. 581; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407; *St. Louis Co.* v. *Prendergast Co.,* 260 U. S. 469; *Buck* v. *Kuykendall,* 267 U. S. 307, 316–317. The Act makes available to others the benefits long enjoyed by the Alabama Power Company. No stockholder made protest until seven months after the execution of the contract in suit. Meanwhile, the Authority had undertaken substantial operations and obligations in reliance on the contract.

Second, the petitioners have established no basis for the maintenance of this suit upon the refusal of the management to sue. The District Court ruled that the contract was not assailable for fraud, negligence, or duress; and that ruling was plainly correct. Nor were the corporate directors guilty of abandonment of discretion; they acted for the best interests of the corporation and disclaimed any opinion that the Act was unconstitutional. The contract was not *ultra vires* the corporation. The theory of the District Court that equity may en-

join a contract for the sole reason that it is in furtherance of an illegal purpose, irrespective of damage, can have no application where a statute is attacked on constitutional grounds. Nor can the suit be maintained to enjoin competition, since the contract limited the activities of the Authority during the life of the agreement to that area served by the lines purchased, and the activities within that area are consensual and not competitive. The claim for declaratory relief from possible future competition upon the expiration of the contract does not give petitioners standing to maintain this suit.

None of the cases of stockholders' suits relied on by the petitioners lends support to their position. *Cf. Hawes* v. *Oakland,* 104 U. S. 450; *Corbus* v. *Gold Mining Company,* 187 U. S. 455; *Dodge* v. *Woolsey,* 18 How. 331; *Hill* v. *Wallace,* 259 U. S. 44; *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180. In each of those cases, there was a showing of *ultra vires* conduct, or duress, or abandonment of discretion, or irreparable injury to the corporation resulting from the application of a taxing or regulatory statute.

II

If it may be assumed that petitioners are properly before the Court, we maintain that the narrow issue involved in this case is the validity of the contract of January 4, 1934, which depends upon the right of the Authority to dispose of the Wilson

Dam power alone. Wilson Dam is a dam *sui generis.* It was constructed to serve two constitutional purposes, navigation and national defense. The generating equipment was installed particularly for national defense purposes. Since the construction of the dam and the power plant those facilities have been maintained and are still being maintained in aid of both constitutional functions.

The legislative background of the Act indicates that it was designed to serve recognized federal functions. The Act provides for operation of the Muscle Shoals properties, a vexatious legislative problem for many years, and authorizes development of the entire Tennessee River in the interest of navigation and flood control, a matter of national concern for a century.

The navigation and flood control project embodied in the Act includes dams now being constructed by the Authority, with which, we submit, this case is not concerned. It may be noted, however, that these dams are essential parts of a project embodied in the Act, based upon long considered and exhaustive studies for development of the river to secure the maximum improvement to navigation on the Tennessee River and the control of flood waters on the lower Tennessee River and the Mississippi River.

The most difficult phase of the historic effort to improve the Tennessee has been the improvement of the thirty-seven mile stretch known as Muscle

Shoals, which presented the most serious obstruction to navigation on the river. The War interrupted consideration of various private proposals and precipitated the construction of Wilson Dam at Muscle Shoals, together with Nitrate Plant No. 2, pursuant to the National Defense Act of 1916. The dam was intended to provide hydroelectric energy for the manufacture of synthetic nitrogen to meet a recognized need for a permanent domestic supply of this indispensable ingredient of explosives. Completed in 1925, after careful consideration of its importance for navigation, the dam provides a slack-water pool extending fifteen miles upstream, thus eliminating the most serious obstruction to navigation on the river.

The disposal of the facilities at the dam, their continued maintenance in aid of national defense and navigation, and, in particular, the disposal of the power created at the dam in such manner as to earn a revenue, to avoid the monopolistic position of the Alabama Power Company, and to diffuse the benefits to numerous small purchasers, were basic factors in the ever-recurring problem. Transmission lines were essential.

We maintain that, under the Commerce and War Powers and the Property Clause of the Constitution, the Government may dispose of any surplus power created by Wilson Dam, and that the conversion of the water power into electric energy and

the transmission of the energy to market for sale are lawful means of disposition.

III

Under the Commerce Clause, the Federal Government may dispose of the water power created by navigation dams constructed, owned, and maintained by it. This proposition has been settled by an unbroken line of decisions of this Court, culminating in *Arizona* v. *California,* 283 U. S. 423. (See *Kaukauna Water Power Co.* v. *Green Bay & Miss. Canal Co.,* 142 U. S. 254; *Green Bay & Miss. Canal Co.* v. *Patten Paper Co.,* 172 U. S. 58, *rehearing denied,* 173 U. S. 179; *United States* v. *Chandler-Dunbar Water Co.,* 229 U. S. 53.) No misapprehension as to the meaning of these decisions has existed in the lower federal courts, and the principle which they establish has been a recognized basis of congressional action for half a century.

Generation of electric energy and acquisition of transmission lines are reasonable means of facilitating the disposal of the water power inevitably created by Wilson Dam. The various means chosen by Congress to dispose of surplus power at federal navigation dams have paralleled scientific development. The National Defense Act of 1916, the Boulder Canyon Project Act of 1928, and the Tennessee Valley Authority Act of 1933 are an outgrowth of the old leasing statutes and reflect the fact that generation and sale of electric energy constitute

usually related incidents of the maintenance of a large navigation dam. The Boulder Canyon Project Act imposed as a condition precedent to construction of the dam, reservoir and power plant by the Secretary of the Interior, the execution of contracts by him for the sale of energy or water adequate to reimburse the United States for the costs of the improvement. The contracts so entered into provided for the allocation of power privileges to generating agencies at the dam, which were under obligation for fifty years to serve other purchasers with whom the Secretary of the Interior contracted for the sale of electric energy.

The constitutional issue of the choice of means is a narrow one. It cannot seriously be contended that while it is wholly reasonable for Congress to employ independent contractors to generate and deliver energy to purchasers from the Government, it is wholly capricious for Congress to employ its own officers for the same purpose. At Wilson Dam the means chosen by Congress are peculiarly appropriate in view of the maintenance of the generating plant for national defense purposes, the construction of the plant for unitary operation, and the long experience of the United States in attempting to dispose of the power in the public interest.

IV

The Muscle Shoals properties, including the dam and generating plant, constitute a valuable national defense asset, as found by the trial court after ex-

tensive testimony by responsible officers of the War Department. The Act requires that the properties be maintained for war purposes, and authorizes the manufacture of explosives and the making of experiments in aid of the national defense. Experiments are presently being carried on by the Authority at the nitrate plant which require the use of the hydroelectric power plant. The Muscle Shoals properties were built as a unit, and unitary as distinguished from divided operation is necessary.

The generation of energy at Wilson Dam requires only that the water be directed through the penstocks instead of being allowed to pass over the dam. Unlike ordinary surplus army supplies, the energy available at the dam must be utilized or it is irretrievably lost. In these circumstances, generation and sale of the surplus power by the United States are appropriate means of disposing of the surplus energy under the war powers.

V

The water power created by Wilson Dam belongs to the United States as owner of the dam. Like other property of the United States, it is held in trust for the people and may be disposed of in the public interest pursuant to the Property Clause of the Constitution. *Cf. United States* v. *Gratiot,* 14 Pet. 526; *United States* v. *Beebe,* 127 U. S. 338; *Camfield* v. *United States,* 167 U. S. 518; *Light* v.

United States, 220 U. S. 523; *Raddy* v. *Rossi,* 248 U. S. 104.

In disposing of the surplus power at Wilson Dam, Congress has adopted the long established policy of assuring wide-spread distribution of the benefits of government-owned property. That policy has governed the disposal of public lands from the beginning of our Government, and also is responsible for the undertaking by the Government of extensive reclamation projects in preference to reliance upon private enterprise, which would require large grants to a few individuals. *Cf. United States* v. *Hanson,* 167 Fed. 181; *Burley* v. *United States,* 179 Fed. 1.

In the circumstances existing at Wilson Dam, the transmission and sale of the surplus electric energy by the United States was particularly appropriate. Sales solely to the Alabama Power Company and its affiliates, the only available purchasers of power at the dam, would not avoid waste or monopoly of the power or effect a wide-spread distribution of its benefits.

VI

These principles are reflected in the established practice of the Government. For almost fifty years provision has been made by Congress for the disposition of power incidentally created by the construction and maintenance of federal water developments. For almost thirty years provision has been made for the conversion of the incidental

water power into electric energy and the sale of that energy. The Bureau of Reclamation has constructed twenty-two power plants at federal reclamation projects, nine of which were operated by the Government in 1932. The Bureau sells power to towns, villages, rural customers, and power companies, and has built and operated transmission lines for commercial purposes. A similar practice has been followed with respect to the power produced as a by-product of navigation developments. The general dam act of 1912 authorized the Secretary of War to make provision for future generation of electricity in the construction of all navigation dams. The Boulder Canyon Project Act of 1928 provided for the sale of electric energy by the Secretary of the Interior to various classes of purchasers, preference being given to states and municipalities.

The ablest legal advisers of the Roosevelt, Taft, and Wilson administrations were agreed that where the Government has constructed a dam for the lawful purpose of improving navigation, it may dispose of the power produced as a by-product.

VII

There is no merit in the contention of petitioners that the activities of the Authority are "intrinsically alien to Federal function" and constitute an invasion of state sovereignty. The fact that the activities of the Authority may be described as commercial or proprietary is of no constitutional sig-

nificance. *Cf. Puget Sound Power & Light Co.* v. *Seattle,* 291 U. S. 619, 625; *Emergency Fleet Corporation* v. *Western Union,* 275 U. S. 415, 424; *Juilliard* v. *Greenman,* 110 U. S. 421, 448.

There is no purpose in the Act to regulate matters reserved to the states by the Ninth and Tenth Amendments. The contracts with the municipalities are subservient to the law of Alabama no less than if the municipalities had made contracts with a private wholesaler. The State of Alabama has exercised its regulatory powers in the instant case by authorizing the municipalities to enter into contracts with the Authority under certain stated conditions. The Supreme Court of Alabama has sustained that legislation. *Oppenheim* v. *City of Florence,* 229 Ala. 50, 155 So. 859.

The "yardstick" is not a law and imposes no regulation or duty. Its function is educational, and, at most, advisory. *Cf. Standard Scale Company* v. *Farrell,* 249 U. S. 571.

VIII

Both courts below properly exercised their discretion in refusing to grant a declaratory decree on the validity of "proposed extensions of the competition" by the Authority. In No. 404, no justiciable controversy is presented, since the complaint is based upon potential or contingent acts and upon assumed potential invasions. (See *New Jersey* v. *Sargent,* 269 U. S. 328, 339; *Arizona* v. *California,* 283 U. S. 423, 462.)

Aside from the prematurity and hypothetical character of the complaints, the restrictive nature of a stockholder's suit is inconsistent with a right to secure declaratory relief in advance of immediately threatened injury. No case has been found where a stockholder, suing in a representative capacity on behalf of the corporation, has obtained a declaratory decree.

In any event, the granting of a declaratory decree is a discretionary matter. In view of the hypothetical and speculative nature of the complaint, and the complicated and uncertain facts, the refusal to grant a declaratory judgment was a proper exercise of discretion.

If the Court should nevertheless deem it appropriate to inquire into activities of the Authority involving new dams, the Record shows that operations thus far undertaken by the Authority are in furtherance of the project "to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins", authorized by the Tennessee Valley Authority Act following the exhaustive survey of the Army Engineers in House Document No. 328, adopted by the Rivers and Harbors Act of 1930 (46 Stat. 918). The District Court found that all of the dams now under construction by the Authority are of the type which are *indispensable* in carrying out these purposes (Fdg. 146, R. 1084; Fdg. 157, R. 1087).

I

THE PETITIONERS AS MINORITY STOCKHOLDERS HAVE NO STANDING IN EQUITY TO MAINTAIN THIS SUIT

The petitioners as minority stockholders must show both that their corporation has a cause of action and that the circumstances of this case require that the cause of action be asserted by the stockholders. The petitioners sue in a derivative capacity only. As the Circuit Court of Appeals observed below, they "are entitled to assert only the rights of the Alabama Power Company" (R. 1305; see also petitioners' brief, p. 231). In both respects the petitioners' case fails to meet the requirements of a stockholder's suit.

The Government contends, first, that the Alabama Power Company is estopped to contest the validity of the Tennessee Valley Authority Act for the reason that it has voluntarily accepted substantial benefits under the Act, and second, that even if the Alabama Power Company is not estopped, there is nothing in this Record to justify a stockholders' suit on behalf of the Company.

A. THE PETITIONERS, SUING IN BEHALF OF THE ALABAMA POWER COMPANY, ARE ESTOPPED FROM BRINGING THIS SUIT

Late in 1925 the Alabama Power Company installed its own transformers and connections at Wilson Dam (Report of Muscle Shoals Inquiry,

H. R. Doc. No. 119, 69th Cong., 1st Sess. 37) and has ever since purchased large quantities of electricity generated at the dam. The amounts of power so purchased between 1926 and 1933 have ranged from about 200,000,000 kwh. to 550,000,000 kwh. per year (Fdg. 172, R. 1089–1090).

The Power Company has continued to purchase electric energy at Wilson Dam since the passage of the Tennessee Valley Authority Act of 1933. Between the date of the passage of the Act and January, 1934, the Power Company and its associates purchased approximately 230,000,000 kwh. (See Annual Report of Tennessee Valley Authority, fiscal year ending June 30, 1934, p. 28.) Provision for the continuation of the purchase of power was made in the contract of January 4, 1934. As a part of this agreement, Section 8 of the contract specifically provided that, in addition to the energy interchanged to satisfy Authority's demands (R. 961), the Authority would sell to the Power Company and its associates on demand, at low rates, all of its "surplus energy", that is, all energy not required to satisfy the Authority's other contracted demand, reserving not less than 20,000 kw. of capacity at all times (R. 140–141). This provision was made entirely for the benefit of the power companies, as is evident from the record of continuous purchases of energy at Wilson Dam since its construction. During the first six months of this contract the Power Company and its associates purchased about 150,000,000 kwh. of surplus

power generated at Wilson Dam. (See Annual Report of Tennessee Valley Authority for fiscal year ending June 30, 1934, p. 28.)

Prior to 1933 the Alabama Power Company was the only party capable of purchasing energy at Wilson Dam. The Tennessee Valley Authority Act was enacted in part to extend to others the benefits theretofore exclusively enjoyed by the Alabama Power Company. The monopolistic position of the Alabama Power Company with respect to the Wilson Dam power had theretofore continued as a matter of practical necessity. The plaintiff stockholders, suing on behalf of the Alabama Power Company, now invoke the Constitution to perpetuate the preexisting situation. It should be enough to say that the claims made in this suit come too late.

One who accepts the benefits of a statute cannot later be heard to challenge its constitutionality. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581; *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407; *St. Louis Co.* v. *Prendergast Co.,* 260 U. S. 469; *American Bond & Mortgage Co.* v. *United States,* 52 F. (2d) 318 (C. C. A. 7th), *cert. denied,* 285 U. S. 538; *cf. Wight* v. *Davidson,* 181 U. S. 371; *Buck* v. *Kuykendall,* 267 U. S. 307, 316–317. The voluntary purchase of electric energy at Wilson Dam after the passage of the Tennessee Valley Authority Act, like the acceptance of a sewer district project (*St. Louis Co.* v. *Prendergast Co., supra*), or the acceptance of a statutory license to

do business (*Buck* v. *Kuykendall, loc. cit. supra; American Bond & Mortgage Co.* v. *United States, supra*), or the resort to a statutory procedure for the determination of damages caused by a taking of property (*Great Falls Mfg. Co.* v. *Attorney General, supra; Wall* v. *Parrot Silver & Copper Co., supra*), bars the beneficiary and all who sue on its behalf from challenging the constitutionality of the statute under which the benefits were enjoyed.

The purchase of power by the Alabama Power Company prior to the contract of January 4 was, of course, purely voluntary. And there can here be no serious contention that the purchase of energy since the execution of the agreement was made under duress. The District Court ruled (R. 290) and, in the Circuit Court of Appeals, petitioners conceded that the Alabama Power Company entered into the contract of January 4, 1934, voluntarily and without legal duress. The ruling was plainly correct. *Silliman* v. *United States,* 101 U. S. 465; *Great Falls Mfg. Co.* v. *Attorney General, supra; Hartsville Oil Mill v. United States,* 271 U. S. 43. The case of *Union Pac. R. R. Co. v. Public Serv. Comm.,* 248 U. S. 67, is clearly distinguishable. The statute there involved required the corporation to obtain a certificate for the issuance of certain mortgage bonds, imposed severe penalties for violation, and purported to invalidate bonds not so authorized. The court held that the railroad's petition for a certificate was made under duress. "... no proceeding has been pointed out to us by which it

adequately could have avoided evils that made it practically impossible not to comply with the terms of the law." (See *id.* at 70; *cf. Ex parte Young*, 209 U. S. 123; *Atchison, Topeka & Santa Fe Ry. Co.* v. *O'Connor*, 223 U. S. 280.)

Apart from the purchase of electric energy, the voluntary execution of the contract of January 4, 1934, and the filing of a petition by the Power Company before the Public Service Commission for approval of the contract (R. 38), are alone sufficient to estop the Power Company and its stockholders from challenging the constitutionality of this Act. The instant case is analogous in principle to *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581. In that case Congress had authorized the Secretary of War to build a dam and to take all lands necessary for the project. He was further directed to give notice of the taking to all interested parties and to make awards for the value of such property. The statute provided that recourse might be had to the Court of Claims within one year's notice of the taking by any party dissatisfied with the award. The plaintiff filed a bill in the Court of Claims to recover the value of his lands one day before the end of the year. The plaintiff then filed a bill in the Circuit Court, alleging the unconstitutionality of the procedure prescribed by the statute for the recovery of damages, and prayed for an injunction and other appropriate relief. The Court held that the plaintiff was estopped to challenge the

constitutionality of the act by the filing of the bill in the Court of Claims.

The *Great Falls* case was followed in *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, in which this Court held that the plaintiff was estopped to challenge the constitutionality of a statute establishing a procedure for the appraisal of the value of stock of minority stockholders refusing to assent to the transfer of the entire corporate assets, after he had petitioned for appraisal of his stock. These cases did not involve a situation where the party both assails and relies upon a statute in the same proceeding. *Cf. Hurley* v. *Comm. of Fisheries of Virginia*, 257 U. S. 223, 225. Nor were they based upon the notion that a party cannot elect inconsistent remedies in separate legal proceedings. The *Wall* case was expressly based on the principle that one "cannot claim the benefit of a statute and afterwards successfully assert it invalid" (244 U. S. 412). This doctrine is applicable to one who challenges the constitutionality of a statute under which he has obtained a mere privilege to do business. *Buck* v. *Kuykendall*, 267 U. S. 307, 316–317; *American Bond & Mortgage Co.* v. *United States*, 52 F. (2d) 318 (C. C. A. 7th); *cf. Ficklen* v. *Shelby County*, 145 U. S. 1. It should be similarly applicable to those who sue on behalf of the Alabama Power Company, which voluntarily executed the agreement of January 4 and applied for and obtained the approval of the Alabama Pub-

lic Service Commission to the transfer of the transmission lines in suit (R. 38–39).

The reasons for invoking an estoppel are particularly compelling in this case. The contract in question was executed on January 4, 1934; the petitioners' bill to enjoin performance thereunder was not brought until more than eight months thereafter. During the interval the Authority, acting in reliance on the validity of the agreement, accepted a conveyance of and paid $850,000 (R. 134, 961) for transmission lines and other properties from the Mississippi Power Company, entered into contracts with municipalities and other purchasers for the sale of power, and refrained from selling energy in Alabama outside the area served by the transmission lines in suit. Several municipalities and rural areas in Mississippi are dependent upon the Authority for electric energy, and the Mississippi properties are being served over one of the lines in suit (R. 959–961; Def. Ex. 97, R. 958).

At no time during the period of the widely publicized negotiations preceding the execution of the January 4 contract, nor for seven months thereafter, did any stockholder protest the transaction. Not until August 7, 1934, did petitioners request the directors of the Alabama Power Company to institute suit (R. 481). None of the plaintiff stockholders contested the application of the Alabama Power Company to the Alabama Public Service Commission, made on May 22, 1934, for approval of the transfer of the properties in question, al-

though the Aetna Coal Company and others intervened for the purpose (R. 39). Certain ice and coal companies, who contributed to the cost of this litigation, had filed an earlier suit against the Authority (R. 444–445).[9] Petitioners have suggested no circumstances, and none appears from the Record, which justify the delay in bringing this suit. Under these conditions any right which the petitioners might have had to contest the validity of the challenged transaction should be barred. The plaintiff stockholders cannot remain silent and allow large operations to be completed and substantial contractual obligations incurred and acted upon where no clear and sufficient justification for the delay is made to appear.

B. THE PETITIONERS HAVE ESTABLISHED NO BASIS FOR THE MAINTENANCE OF THIS SUIT UPON THE REFUSAL OF THE MANAGEMENT TO SUE

The District Court ruled that the contract of the Power Company with the Authority promotes an illegal objective and is therefore *ultra vires* the Power Company, and hence that the contract and refusal to disaffirm it constitute an abuse of discretion by the directors of which the stockholders may complain. (*Cf.* Fdg. 19, R. 1039–1040.) We submit that the theory of the District Court is without merit, and further that there are no other grounds

[9] That suit was filed on June 14, 1934, in the United States District Court for the Northern District of Alabama, Docket No. 810.

upon which plaintiff stockholders may maintain this suit.

This Court has held that, in the absence of a showing of fraud, duress, negligence, or oppression a stockholder must show that the action of the management is *ultra vires* or constitutes a grave abuse or abandonment of discretion, threatening irreparable injury to the corporation and its stockholders. *Dodge* v. *Woolsey,* 18 How. 331, 341; *Hawes* v. *Oakland,* 104 U. S. 450, 460; *Greenwood* v. *Freight Co.,* 105 U. S. 13, 16. The stockholders cannot require the management to assert every cause of action the corporation may have if, in the opinion of the management, the corporation's claim should be waived or compromised in the interest of the corporation. *Corbus* v. *Gold Mining Co.,* 187 U. S. 455, 463; *United Copper Securities Co.* v. *Amalgamated Copper Co.,* 244 U. S. 261; *Hawes* v. *Oakland, supra; Samuel* v. *Holladay,* Fed. Cas. No. 12,288, 21 Fed. Cas. 306, 311, 312 (D. C. Kan.). And, of course, the stockholders cannot complain of a transaction because of a mistake in business judgment on the part of the management. The petitioners' case falls far short of meeting these requirements.

The District Court, in ruling on the motion to dismiss, held that the bill of complaint did not assert facts sufficient to show fraud, negligence or duress in the making of the contract. The court stated (R. 289–290):

> There is no showing that the management of the Alabama Power Company were guilty

of fraud, oppression, or gross negligence. They are shown to have acted in good faith and because they thought the transaction with the Tennessee Valley Authority was in the interest of the Alabama Power Company.

It is not shown that the management of the Alabama Power Company, in the transaction with the Tennessee Valley Authority, acted under legal duress.

This ruling was plainly correct. As the District Court observed (R. 290), the possibility that the Authority would duplicate the facilities of the Power Company could not constitute legal coercion in the making of the contract, since the Power Company was at liberty, if it deemed such possible duplication illegal, to seek to have it restrained. *Cf. Silliman* v. *United States,* 101 U. S. 465; *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581; *Hartsville Oil Mill* v. *United States,* 271 U. S. 43. The action of the Power Company was not the result of legal coercion, but of an exercise of honest business judgment. Indeed, in the Circuit Court of Appeals the petitioners acknowledged that there was no legal duress in the making of the contract.

Any suggestion that the directors were guilty of abandonment of discretion is equally unfounded. The Record is barren of any evidence that the management believed that the Tennessee Valley Authority Act was unconstitutional and acted in

spite of that belief from fear of public opinion. *Cf. Dodge* v. *Woolsey,* 18 How. 331; *Chicago* v. *Mills,* 204 U. S. 321; *Hill* v. *Wallace,* 259 U. S. 44. The Record shows, on the contrary, that the directors entered into the agreement disclaiming any opinion that the Act was unconstitutional, and that their sole motive was to promote the interest of the corporation (R. 488–489). The management explained that it was in the best interest of the Company to accept the offer of the Authority for the purchase of transmission lines in a limited area, coupled with an agreement on the part of the Authority not to sell outside of that area during the life of the contract. The contract not only protected the Company against possible entrance of the Authority into its territory where nine-tenths of its customers, including the largest, are located, but also assured the Company that so long as it elected to retain its urban distribution systems within the territory served by the transmission lines, those systems would be serviced by power from Wilson Dam during the life of the contract (R. 137–138). A consideration of $1,150,000 was agreed to be paid by the Authority upon the delivery of the transmission lines. In accordance with the ruling of the District Court on the motion to dismiss, no question was tried as to the adequacy of that consideration, and there is nothing in the Record to warrant remanding the case to

the trial court for further consideration of that issue.[10]

The theory upon which the District Court entertained the suit was that if the contract was beyond the constitutional powers of the Authority, it was illegal and was therefore *ultra vires* the Company. This theory is without any support in the decisions and is untenable in principle. It is true that equity has jurisdiction in a suit by minority stockholders to enjoin the management of their corporation from pursuing *ultra vires* activities. Such jurisdiction is based upon the rule that a stockholder is entitled to be protected against a variation in the risk assumed by him in an enterprise limited by the corporate charter. (See *Dodge* v. *Woolsey,* 18 How. 331, 341.) But where the asserted infirmity of the transaction is that it is beyond the corporate powers of the other corporation, this rule has obviously no application. *Cf. Railroad Co.* v. *Ellerman,* 105 U. S. 166; *Hinds County* v. *Natchez J. & C. Ry. Co.,* 38 So. 189 (Miss. 1905).

The fact that the transaction is claimed to be in furtherance of an unconstitutional purpose does not

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[10] The only fact in the Record which has been adduced as bearing on this question is the recital in an exhibit to the contract of the replacement values of the properties to be transferred. The contract price is 66.267% of this stated replacement value, not taking account of depreciation (R. 156, 680–681). Obviously, this fact standing alone affords no basis for judging the adequacy of the consideration; *cf. Atlanta & Birmingham Coast R. R. Co.* v. *United States,* No. 9, present term, United States Supreme Court, decided November 11, 1935.

enlarge the right of minority stockholders to attack it. The District Court was of opinion that there is jurisdiction in equity to annul a corporate transaction which has not been completely executed, where the transaction tends to "accomplish an illegal object" (R. 291). *Cf. Central Transportation Co.* v. *Pullman Co.*, 139 U. S. 24. But to apply such a doctrine to the present stockholders' suit contravenes the settled principle that no one can challenge the constitutionality of a statute without proof of injury to himself. *Tyler* v. *Judges of the Court of Registration*, 179 U. S. 405; *Frothingham* v. *Mellon*, 262 U. S. 447. Such proof of injury is wholly wanting in the present case. The contract was executed for an adequate consideration, which was to be paid at the time of the delivery of the properties to the Authority. To that extent the contract would be completely executed from the outset. The only other portions of the contract are the covenant of the Authority not to enter nine-tenths of the Power Company's territory (i. e., containing nine-tenths of its customers, including the largest)—a provision which benefits rather than injures the Company—and the agreement for an interchange of power, which is also advantageous to the Company. Even in the remote event that the contract should be terminated, the Company would be in no worse position than it occupied before the execution of the agreement.

As a showing of damage, some suggestion was made in the bill of complaint (R. 51, *cf.* R. 291), ap-

parently now abandoned, that the Government might at some future time seek to recover what it has paid on the ground that its own act was unconstitutional. The suggestion of such a course of action, which has never been pursued, which it is fanciful to imagine ever would be pursued, and the legality of which is doubtful, is scarcely a sufficient showing of damage to entitle minority stockholders to maintain this suit.[11] *Cf. Frothingham* v. *Mellon, supra; New Jersey* v. *Sargent,* 269 U. S. 328. As one court has observed with respect to a similar suggestion: "Perhaps it is not enough to say that Don Quixote never waged battle against as unreal a foe as is this ghost of a possibility." *Missouri Utilities Co.* v. *City of California,* 8 F. Supp. 454, 467 (D. C. W. D. Mo.).

[11] None of the decisions, holding that money paid out without authority of law by an official of the United States may be recovered from the recipient, involved a grant clearly authorized by act of Congress thereafter held invalid. *Cf. Wisconsin Central R. R. Co.* v. *United States,* 164 U. S. 190; *Bayne* v. *United States,* 93 U. S. 642; *United States* v. *Burchard,* 125 U. S. 176; *Sutton* v. *United States,* 256 U. S. 575; see *Missouri Utilities Co.* v. *City of Calfornia, supra,* at 467.

Any likelihood of recovery in a suit by the Government for funds paid out by the United States under the instant contract would seem to be dispelled by the doctrine of *United States* v. *Realty Co.,* 163 U. S. 427. The doctrine that the Congress has the constitutional power to appropriate funds to pay equitable or moral obligations would seem to have clear application to the appropriation of funds for the payment of debts contracted under an act presumed to be constitutional. *Cf. Atlantic Coast Line R. R. Co.* v. *State of Florida,* 55 Sup. Ct. 713.

None of the cases of stockholders' suits relied upon by the petitioners lends support to their position. In all of them there was a showing of *ultra vires* conduct, or duress, or abandonment of discretion. In all of them there was a showing of an irreparable injury to the corporation or its stockholders. In *Dodge* v. *Woolsey,* 18 How. 331, the directors were about to pay voluntarily an allegedly illegal tax even though they fully shared the view of the complaining stockholder that the tax was illegal. This the Court declared "partakes more of a disregard than an error of judgment" (*id.* at 343, 344). (See also *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79, 113; and *Hill* v. *Wallace,* 259 U. S. 44, 60.) Similarly, in *Pollock* v. *Farmers Loan and Trust Co.,* 157 U. S. 429 (followed in *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1), the Court considered a threatened voluntary payment of an illegal tax as an "illegal payment out of [the corporation's] capital or profits", a breach of trust of which a stockholder may complain in equity. (See 157 U. S. at 553.) In many of the cases the management was acting under duress, since the statutes involved imposed an obligation upon the corporation and provided specific penalties for noncompliance. *Smyth* v. *Ames,* 169 U. S. 466; *Ex parte Young,* 209 U. S. 123; *Chicago* v. *Mills,* 204 U. S. 321; *Cotting* v. *Kansas City Stock Yards Co., supra; Hill* v. *Wallace, supra.* In *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180, the bill of complaint alleged that the Title Company was without authority to invest

in invalid securities and that the investment in allegedly worthless bonds of the Federal Land Banks and Joint Stock Land Banks was *ultra vires* the title company. The Court entertained the suit solely on this theory. (See *id.* at 199; and dissent of Mr. Justice Holmes, *id.* at 214.)

In short, the case at bar is apparently the only recorded case in the federal courts in which minority stockholders have been permitted to sue to annul a contract of their corporation which is not assailable for fraud, duress, gross negligence or abandonment of discretion, and which is not *ultra vires* the corporation, but which is attacked on the sole asserted ground that it is beyond the constitutional power of the other contracting party.

Petitioners' claim for declaratory relief from possible future competition after the expiration of the contract in suit is the question raised in No. 404 and is treated *infra* at 161.

The petitioners also contend that their corporation is threatened with illegal competition resulting from the transfer of the transmission lines under the contract.

The contract furnishes a short answer to this contention. During the life of the contract the Authority is limited in its activities to the area served by the lines purchased. This limitation was part of the consideration for which the management bargained. The activities of the Authority within that area are consensual and not competitive. The Commonwealth & Southern Corporation (the parent

company) referred to the contract as an "amicable agreement" (R. 87). The petitioners' standing to maintain this suit depends solely upon their right to set aside this contract.

The issue raised by the petitioners is thus seen, upon analysis, not to be one of illegal competition but rather one of the soundness of the judgment of the corporate management in seeking to protect the corporation in the most advantageous way against the possibility of competition. The refusal of the directors to sue to enjoin the Authority's activities was based on their successful negotiation of a contract securing for the corporation a *quid pro quo* in the form of over a million dollars and covenants on the part of the Authority. This Court has said that a possible cause of action by a corporation may be waived, against objection by minority stockholders, where there has been an honest exercise of judgment by the management. *Hawes* v. *Oakland,* 104 U. S. 450, 460; *Corbus* v. *Gold Mining Co.,* 187 U. S. 455, 463; *United Copper Securities Co.* v. *Amalgamated Copper Co.,* 244 U. S. 261; *cf. Samuel* v. *Holladay,* Fed. Cas. No. 12,288, at 312. Minority stockholders have obviously much less standing where the refusal of the corporation to sue is grounded on the execution of a contract such as the one here in question. The minority stockholders seek to have the Court overturn this exercise of business judgment by the directors, despite the fact that the directors acted solely for the interest of the corporation; that they disclaimed

any opinion that the Tennessee Valley Authority Act was unconstitutional; and that the Act is properly presumed to be constitutional.

To entertain the suit in these circumstances is, we submit, not only without precedent but is in contravention of principles of decision which heretofore have been regarded as salutary and settled.

II

The Legislative Background of the Tennessee Valley Authority Act Shows That It Was Designed to Serve Recognized Constitutional Functions

The Tennessee Valley Authority Act embodies several functions traditionally federal in character. It establishes a government corporation to maintain the government properties at Muscle Shoals in the interest of national defense, after numerous efforts to obtain a satisfactory private lessee had failed. It provides for the generation and transmission of surplus electric energy as the only means which, in the mature judgment of Congress, would avoid the waste or monopoly of the power and earn a fair return, in accordance with a congressional policy which has long governed the disposition of water power. The Act reflects principles and policies which originated in our early history and were given renewed impetus in the conservation movement at the turn of the century. In addition to providing for the disposition of the Muscle Shoals properties, the Act authorizes the development of

the Tennessee River in the interests of navigation and flood control.

As has been noted, the Tennessee Valley Authority Act was adopted only after thorough consideration by congressional committees and the Congress extending over a period of some fifteen years. During this entire period the only proposals for the solution of the Muscle Shoals problem which have received the approval of both branches of Congress have provided for the maintenance and operation of the properties by a government agency. A consideration of the reasons for this congressional attitude suggests that the provisions of the present Act are a fitting, perhaps the only fitting, means to protect and promote all of the vital national interests involved.

A. THE DEVELOPMENT OF THE TENNESSEE RIVER FOR THE IMPROVEMENT OF NAVIGATION AND THE CONTROL OF DESTRUCTIVE FLOOD WATERS

The Tennessee River,[12] which is formed by the junction of the Holston and French Broad Rivers in east central Tennessee, flows successively southwest, west, and north through parts of Tennessee, Alabama, and Kentucky, and enters the Ohio River at Paducah, Kentucky (Def. Ex. 10; R. 716). The river is 647.7 miles in length from Knoxville, Tennessee, near its beginning, to Paducah. In that

[12] For a full description of the river and its basin see H. R. Doc. No. 328, 71st Cong., 2d Sess. 1, 8, 9, 30, 31.

distance there is a fall of about five hundred feet (R. 716, 717). There are a number of tributaries, and the drainage basin has an area of 40,600 square miles (R. 716, 717). The main stream is a navigable waterway over its entire length, although navigation is impeded or prevented at a number of points because of shoals, snags, and currents (R. 717–719). Extreme seasonal variation in stream flow coupled with steep slopes and resultant currents produces corresponding difficulties in navigation (R. 718). The controlling depths of the open channel range from one to four and one-half feet except for the nine-foot pool provided by Wilson Dam and two short pools at Widow's Bar Dam and Hale's Bar Dam, constructed by private interests (Def. Ex. 12, R. 722; H. R. Doc. No. 328, 71st Cong., 2d Sess. 1).

In consequence, navigation has been carried on in relatively short hauls; through traffic from Knoxville to Paducah has not been commercially feasible, though it is possible in certain parts of the year (R 724, 725). In spite of the fact that the average haul was less than twenty miles, the commerce on the river in 1926 amounted to nearly two million tons, representing an estimated saving in transportation costs in that year of $1,877,704.[13]

[13] A tabulation of figures from the Annual Reports of the Chief of Engineers of the United States Army from 1891 to 1930 disclosed that the traffic on the river averaged about 500,000 tons in the years 1891 to 1895, ranged between 1,000,000 to 1,600,000 tons from 1895 to 1925, and approached or exceeded 2,000,000 tons from 1926 to 1930 (R. 724).

(See H. R. Doc. No. 328, 71st Cong., 2d Sess. 2, 10, 35, 83.)

The high rainfall in the basin, averaging fifty-one inches and running as high as eighty inches in the mountainous regions and subject to great variations (R. 718), presents a serious flood problem (Fdg. 139, R. 1083; R. 752) which interferes with commerce not only on the river but on highways and railroads (Fdg. 166, R. 1089). Floods occur frequently on the main stream and on the lower parts of most of the tributaries, the most serious menace being at Chattanooga (Fdg. 139, R. 1083; R. 796–800; H. R. Doc. No. 328, 71st Cong., 2d Sess. 2). The average damage from these floods has been estimated at $1,780,000 annually, not including, however, losses due to interrupted traffic and business, unsanitary conditions and spread of disease due to the flooding of towns, depreciation of land on account of overflow, and the like (R. 796, 797, 752; H. R. Doc. No. 328, 71st Cong., 2d Sess. 2, 39). The foregoing estimate of flood damage, because of the omission of these items, may be deemed wholly inadequate (R. 797). The flood problem in the Tennessee Valley cannot be adequately solved by means of levees or local protection works alone, and storage by means of reservoirs is essential to adequate flood control on the Tennessee (Fdg. 140, R. 1083).

The disastrous floods in the Mississippi River Valley, culminating in the flood of 1927, had made

flood control upon the Mississippi and its tributaries a problem of national importance (see Flood Control Act of 1928, 45 Stat. 534).[14] The use of reservoirs on the tributaries of the Mississippi River, such as the Tennessee River, to provide protection on the tributary and supplement the levee protection on the Mississippi River, long considered, has recently been recommended by the Mississippi River Commission after an extended investigation made under congressional mandate (R. 764, 765, 766, 767, 768).

Prior to the Tennessee Valley Authority Act, extensive projects had been undertaken by the Federal Government to improve the river for navigation (Fdg. 130, R. 1082). Between 1852 and 1918, shortly after construction of Wilson Dam was begun, no less than seventeen surveys and projects had been authorized and appropriations therefor made, covering all portions of the river (Def. Ex. 11, R. 719; R. 719, 720).[15] In addition, there had

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[14] "The plan adopted by the Flood Control Act of 1928 for a levee system on the lower Mississippi supplemented by diversion flood-ways, is not completely adequate for protection against flood damage and leaves considerable areas in the alluvial valley unprotected from floods" (Fdg. 144, R. 1084).

Section 10 of the Flood Control Act of 1928 directed further investigation of the use of reservoirs to supplement levee protection.

[15] See Appendix G, for a compilation of acts regarding navigation projects on the Tennessee and its tributaries.

been ten surveys and projects on the tributaries (Def. Ex. 11, R. 719).

As early as 1909, the Congress directed the Chief of Engineers to make a survey of the whole of the Tennessee River "with a view to securing the best permanent navigation by open channel work, or locks and dams or both", and make an estimate of the cost of a six-foot channel from Knoxville, Tennessee, to Chattanooga, Tennessee, and a nine-foot channel from Chattanooga to Paducah, Kentucky. (See Rivers and Harbors Act of March 3, 1909, 35 Stat. 815, 832.) In 1916, in response to congressional direction, the Board of Engineers for River and Harbors recommended continuance of the navigation projects on the river (H. R. Rep. No. 981, 64th Cong., 1st Sess. 7). A total of $23,400,000 had been expended in this work prior to 1930, exclusive of expenditures at Muscle Shoals charged to power production (H. R. Doc. No. 328, 71st Cong., 2d Sess. 1, 9; *cf.* also Def. Ex. 11, R. 719). These previous undertakings are described briefly in the Record at pp. 719–720,[16] showing the projected depths for navigation which they were designed to secure. (See Def. Ex. 11, R. 719.) In 1930, the entire length of the river was under improvement

[16] The principal documents describing the navigation surveys and undertakings are the following: H. R. Doc. No. 319, 67th Cong., 2d Sess. (1922); H. R. Doc. No. 463, 69th Cong., 1st Sess. (1926); H. R. Doc. No 185, 70th Cong, 1st Sess. (1928); H. R. Doc. No. 328, 71st Cong., 2d Sess. (1930) (R. 726).

by the Federal Government (H. R. Doc. No. 328, 71st Cong., 2d Sess. 1).

The latest and most comprehensive project prior to the Tennessee Valley Authority Act was that adopted in the Rivers and Harbors Act of 1930 (Appendix H, p. 99), embodying the recommendations of the Chief of Engineers in House Document No. 328. The Corps of Engineers spent five years in making this extensive survey, of which it was authoritatively declared:[17] "There has never been presented to Congress a more thorough and exhaustive study" (R. 738). That project provided for a unified development of the Tennessee River with a controlling depth of nine feet throughout its entire length. This was to be accomplished on the main stream through the construction of thirty-two low dams by the Federal Government, or of seven high dams with the cooperation of private interests, states, municipalities, or other responsible interests under the provisions of the Federal Water Power Act of 1920 (41 Stat. 1063). The estimated cost to the Government was $74,709,000 (H. R. Doc. No. 328, 71st Cong., 2d Sess. 5). The Chief of Engineers was directed to report to Congress on such prospective cooperation (R. 748, 749). The intent of the recommendation of the Chief of Engineers was that "it would be better to improve the Ten-

[17] This statement was made by Major General Lytle Brown, then Chief of Engineers, in his comment on House Document No. 328 when it was forwarded to Congress.

nessee River by high dams rather than low dams"; but there seemed to be more immediate opportunity of proceeding with the less expensive low-dam project (R. 760, 761). As stated by the present Assistant Chief of Engineers of the Army, "It has always been the view of the Department that the desirable improvement was with high dams, the excess cost being paid by the return from the surplus power" (R. 761).

Besides providing the most desirable navigation channel [18] the high dams would be valuable for flood control on the Tennessee and Mississsippi Rivers (Fdg. 157, R. 1087; Fdgs. 141, 142, 145, R. 1084; R. 764–773, 783–789, 803, 804, 805, 1013, 1014). And, of course, the low dams have no utility for flood control (R. 748, 769, 773). The completion of the nine-foot project by means of high dams would, it was testified, make the Tennessee River physically the best improved waterway in the country (R. 738, 743)[19]

[18] "There is no question as to the superiority of high dams over low dams for purposes of navigation" (R. 754). The findings of the District Court and the Record established the superiority of high dams (Fdg. 157, R. 1087; Fdg. 134, R. 1082, 1083; R. 406, 407, 408, 452, 729, 730, 731, 732, 754–759). For a summary of the physical advantages, see Def. Ex. 16, R. 726.

[19] Estimates of increased tonnage and resultant saving in transportation cost expected from the improvement were made by the District Engineer in charge of the survey (R. 739, 740). *Cf.* Comments of Board of Engineers for Rivers and Harbors, H. R. Doc. No. 328, 71st Cong., 2d Sess. 10–14, 20.

There was no reasonable prospect in 1933 that a comprehensive development of the Tennessee River and its tributaries for the combined purpose of navigation and flood control, available only by the high dams, could be obtained in any way other than by the construction of those dams by the Federal Government or some agency thereof (Fdg. 127, R. 1081; see H. R. Doc. No. 131, 72d Cong. 1st Sess.; R. 822, 841, 842, 843, 1025). During the hearings on the Tennessee Valley Authority Act of 1933 the spokesman of the power companies stated explicitly that the companies would never be interested in high dam developments on the Tennessee River and that if dams were to be built, the Government must build them. (See Hearings before House Committee on Military Affairs, 73d Cong., 1st Sess. 113, 121, 214.) The vice president of the Alabama Power Company candidly recognized that the projects authorized by the pending legislation were in furtherance of proper and desirable development of the Tennessee River for navigation and flood control (*id.* at 214):

> The development of power in the Tennessee River is incidental to other advantages that inhere in the plan, and we are not here protesting the plan nor the construction of the dams at all. * * * There is navigation, flood control, reforestation, and the other features that enter into the entire plan.

The Tennessee Valley Authority Act was enacted for the purpose of maintaining and operating the

properties then owned by the United States in the vicinity of Muscle Shoals and "to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins" [20] (Section 1). Each of the three dams now under construction has been recognized as indispensable in carrying out these purposes. The functions of these dams and their relation to navigation and flood control are discussed in detail under No. 404, *infra* at 168–175.

B. THE HISTORY AND FUNCTIONS OF WILSON DAM

The most difficult phase of the historic effort of the Federal Government to improve the navigable character of the Tennessee River has been the improvement of the thirty-seven mile stretch between Brown's Island and Florence, Alabama, known as Muscle Shoals, where the extreme slope gives rise to shoals and rapids which form a complete barrier to upstream navigation at all times and to downstream traffic except at high stages and at great hazard (R. 719). The effort of the United States Government to improve this portion of the river began on December 7, 1824, when President Monroe in his annual message to Congress presented the report of the Secretary of War, John C. Calhoun, recommending a survey of Muscle Shoals as one of the three great works which he regarded as most important for the improvement of trans-

[20] Section 4 (j), *supra* at 3, provides for the creation of a nine-foot channel from Knoxville to the mouth.

portation conditions in the United States (Sen. Doc. No. 1, 18th Cong., 2d Sess.; H. R. Doc. No. 119, 69th Cong., 1st Sess. 11, 12; R. 708). History recounts numerous efforts on the part of the State and Federal Governments to overcome this natural barrier to commerce.[21] Despite the magnitude of these efforts, they resulted only in a small and incomplete improvement, leaving that portion of the river navigable only in certain months of the high-water season (H. R. Doc. No. 119, 69th Cong., 1st Sess. 11, 12; H. R. Riv. and Harb. Comm. Rep. No. 20, 63d Cong., 2d Sess. 49; R. 708).

At the end of the nineteenth century, new impetus was given to the navigation project at Muscle Shoals with the realization that such a project could be accompanied by the development of hydroelectric power. In 1899, Congress granted the application of the Muscle Shoals Power Company to construct a canal and power stations at the shoals (30 Stat. 1351). No construction was undertaken, however, and in 1903 a similar bill was passed by Congress which, however, was vetoed by President Theodore Roosevelt (36 Cong. Rec. 3071). This veto message marked the complete recognition of the physi-

[21] In 1871 the United States enlarged and repaired an old canal which had been begun by the State of Alabama with the aid of federal funds in 1831 (R. 708). A new federal project, planned in 1872, was completed in 1890 at a cost of over three million dollars. In 1891 an extension costing an additional three million dollars was proposed (H. R. Doc. No. 119, 69th Cong., 1st Sess. 11, 12).

cal, functional, and economic relationship between disposal of water power and improvement of navigation at Muscle Shoals:

> The recent development of the application of water power to the production of electricity available for use at considerable distances has revealed an element of substantial value in streams which the Government is or is likely to be called upon to improve for purposes of navigation, and this value, in my judgment, should be properly utilized to defray the cost of the improvement. Wherever the Government constructs a dam and lock for the purpose of navigation there is a water fall of great value. It does not seem right or just that this element of local value should be given away to private individuals of the vicinage, and at the same time the people of the whole country should be taxed for the local improvement.
>
> It seems clear that justice to the taxpayers of the country demands that when the Government is or may be called upon to improve the stream the improvement should be made to pay for itself, so far as practicable.

In 1906, a new company, the Muscle Shoals Hydroelectric Power Company, entered the field with a proposal for a joint investment by the Government and the Company whereby the canal navigation improvement, which was unsatisfactory, would be abandoned for a complete slack-water improvement which would provide a minimum depth of six feet and would utilize the full power of the

river flow (H. R. Doc. No. 781, 60th Cong., 1st Sess. 55, 57). A long series of negotiations between Congress and private power interests ensued. Numerous plans were submitted and examined. In 1912, the House Committee on Rivers and Harbors requested the Board of Engineers for Rivers and Harbors to review all previous reports on this section of the river and to submit an estimate based upon a navigation improvement which would conserve the water power (H. R. Riv. and Harb. Comm. Rep. No. 20, 63d Cong., 2d Sess.). Finally, the Corps of Engineers, which had consistently disapproved the previous suggestions of joint development by the Government and private interests, recommended to Congress that the complete slackwater development of the Muscle Shoals area proposed by the Muscle Shoals Hydroelectric Power Company be adopted, since in its opinion the expected payments by the company for the resulting power would reimburse the Government in part for the navigation improvement (*id.* at 1, 2, 6). Under this recommendation the Government was to expend more than $18,000,000 in the construction of several high dams and was to receive certain payments over a period of one hundred years from the power company, which would contract to buy the power resulting from the navigation developments. This proposal was never introduced in Congress in the form of a bill, and the House manifested its disapproval of joint private and governmental development by striking out from the Rivers

and Harbors Bill of 1915 an item of $150,000 for preliminary engineering work at Muscle Shoals. (See 52 Cong. Rec. 1859–1874.)

The World War interrupted consideration of these proposals and precipitated the construction of a dam at Muscle Shoals without adequate provision for disposing of the surplus power. The War centered attention upon the relation between power development and national defense, particularly in the production of nitrates, which are the basic ingredients of all explosives. In 1916, the Board of Engineers for Rivers and Harbors and the Chief of Engineers suggested that plans for the Muscle Shoals development be suspended pending determination whether the resulting power should be used for the production of nitrates (H. R. Doc. No. 1262, 64th Cong., 1st Sess. 3). The Chief of Ordnance directed attention in 1916 to our absolute dependence upon Chile for nitrates, pointed out the hazard of ocean transport, and stated that the amount then in storage would be insignificant in comparison with the requirements in war time (War Dept. Rep. No. 2041 (1922) p. 260). The report recommended the construction of plants for the manufacture of synthetic nitrogen, as had been done by several European countries, and suggested that the necessary hydroelectric power [22] might be

[22] Hydroelectric power, primary in character and substantial in amount, was recognized as a prerequisite to meeting this existing national defense need (53 Cong. Rec. 5649).

developed with maximum economy in connection with improvements to navigation (*id.* at 260, 261).

Section 124 of the National Defense Act (39 Stat. 166, 215) authorized the construction of dams, locks, improvements to navigation, power houses, and other plants and equipment which might be necessary or convenient for the generation of hydroelectric power for the production of war materials, principally nitrates. Pursuant to that section, the construction of Wilson Dam (and the nitrate plants) was begun in 1917 (Fdg. 38, R. 1046; R. 709). (See H. R. Rep. No. 48, on H. R. 5081, 73d Cong., 1st Sess. 2.) The Sheffield Steam Plant was constructed to provide electric power for the operation of the nitrate plants pending completion of Wilson Dam and thereafter for auxiliary or stand-by uses (Hearings before Senate Committee on Agriculture and Forestry, 68th Cong., 1st Sess. (1924) 327). The War ended before the dam was completed, but construction continued until 1921, when the original appropriation was exhausted (R. 709). In 1922, funds were provided for the completion of the dam in the Second Appropriation Act of that year; in the consideration of this appropriation careful attention was paid to the navigation aspects as well as the national defense aspects of the project. (See Hearings before Subcommittee of House Committee on Appropriations, 67th Cong., 3d Sess. 14, 18, 76, 91.) Consideration was also given to the fact that revenues from

the sale of the incidental power would partially defray the cost of the navigation improvement to be secured by Wilson and Wheeler Dams (*ibid.*).

In 1925, Wilson Dam was completed, marking the culmination of a century of effort to improve for navigation the worst stretch of the Tennessee River. The dam is a concrete monolith, one hundred feet high and almost a mile long, containing two locks for navigation and eight installed generators (H. R. Doc. No. 119, 69th Cong., 1st Sess. 35–37). It provides a pool extending fifteen miles up the river with a minimum depth of nine feet, fully accommodating the type of commercial vessels now in vogue on the Ohio and Mississippi Rivers (R. 726). A single high dam, of the type of Wilson Dam as constructed, was, as the District Court found, the only feasible method of improving this stretch of the river for commercial navigation (Fdg. 131, R. 1082; R. 720, 721, 724).

The locks are operated by the War Department. Section 5 (k) of the Tennessee Valley Authority Act requires the Authority to deliver to the Department such amounts of electric power as are necessary in the judgment of the Department for use in the operation of the locks, lifts, and other facilities in aid of navigation. A small but continuous use of electricity is needed to operate these locks and serve the reservation (Fdg. 54, R. 1050, 1051). There is no suggestion that the United States has not continuously operated, or is not

currently operating, the dam to maintain the waters at a depth necessary to provide an adequate commercial nine-foot waterway for the fifteen miles above Wilson Dam.

C. THE OPERATION OF THE MUSCLE SHOALS PROPERTIES IN THE INTEREST OF NATIONAL DEFENSE: UNITARY OPERATION

The chief problem in connection with the Muscle Shoals project has been the appropriate use of the national defense facilities and the distribution of the incidental power there created.

The first proposal for the utilization of the Muscle Shoals properties was the so-called Wadsworth Bill of 1919 (S. 3390, 66th Cong., 1st Sess., 60 Cong. Rec. 812–813) introduced at the request of Secretary of War Baker, which passed the Senate in 1921 (60 Cong. Rec. 1414). This bill was received by the House on January 15, 1921, and was thereupon referred to the House Committee on Military Affairs (60 Cong. Rec. 1488), from which it was never reported. The bill provided for the creation of a federal corporation to administer and operate the Muscle Shoals properties. It set the pattern for all future Muscle Shoals legislation in authorizing the maintenance and operation of the properties for the purpose of furnishing explosives, either for actual war or peace-time operation, and for the making of experiments in the production of war materials. The War Department, after careful investigation and consideration of the problem,

recommended the peace-time production of nitrates for fertilizers and war explosives as a means of maintaining the properties and a trained personnel in readiness for war. (See letter of Secretary of War Baker to Senator Wadsworth enclosing the proposed bill and attaching a letter of Mr. Arthur Glasgow, Fixed Nitrogen Administrator, to Secretary Baker, 59 Cong. Rec. 4782, *et seq.*) *Cf.* War Dept. Report 2041, p. 289 (1922). The importance of national defense was stressed in the consideration of all subsequent proposals (Sen. Rep. No. 678, 66th Cong., 1st Sess. 3; H. R. Rep. No. 2303, 69th Cong., 2d Sess.; H. R. Rep. No. 1095 (Appendix) 70th Cong. 1st Sess. 7; H. R. Rep. No. 48, 73d Cong., 1st Sess. 2, 7). The large-scale manufacture of fertilizer, which was one of the objects sought in the Wadsworth bill and other proposals, is not here in issue.

The basic conception of the Wadsworth Bill was that constant experimentation was necessary in order to prevent obsolescence. (See letter of Mr. Arthur Glasgow to Secretary of War Baker, *supra,* set forth in Report of Muscle Shoals Inquiry, H. R. Doc. No. 119, 69th Cong., 1st Sess. 18.)[23] None of

[23] Even at the time the plants were constructed, the processes of the fixation of nitrogen were in a state of flux. At the conclusion of the War it appeared that the cyanamid process, for which Nitrate Plant No. 2 was constructed, might be superseded by modifications of the Haber process. (See Sen. Rep. No. 831, Part 1, 67th Cong., 2d Sess. 2–3, 8–9.)

the proposals for private leases contained any adequate undertaking to conduct experiments in the production of nitrogen and other materials in the interest of the national defense.[24] It was suggested that a private lessee, operating for private benefits, would have little incentive to invest in extensive research; from long usage and tradition such work had come to be considered peculiarly a governmental function. (See Sen. Rep. No. 19, 71st Cong., 1st Sess. 6, 7; 67 Cong. Rec. 5203; 68 Cong. Rec. 4536, 4537.)

The government operation of the power plant for national defense purposes was naturally deemed to preclude the leasing of the surplus capacity for private operation. The policy of operating the Muscle Shoals properties as a unit was strongly recommended by various committees which considered the Muscle Shoals problem as early as 1922. (See Report of Subcommittee of House Committee on Military Affairs, H. R. Rep. No. 1430, Part 2, 71st Cong., 2d Sess. 4; Report of Muscle Shoals Inquiry, H. R. Doc. No. 119, 69th Cong., 1st Sess. 3; H. R. Rep. No. 2303, 69th Cong., 2d Sess. 2.) Reasons of physical necessity alone furnished sufficient justification. The plant was built as a unit; its manage-

[24] The Joint Committee, established pursuant to H. R. Con. Res. No. 4, 69th Cong., 1st Sess., to invite and consider proposals for the leasing of the Muscle Shoals properties, reported only two as worthy of consideration. "Research (was) not a factor in either case as outlined in the proposals" (H. R. Rep. No. 980, 69th Cong., 1st Sess. 6).

ment, its service system, and other physical details, all contemplated unitary operation. (See H. R. Rep. No. 1430, Part 2, 71st Cong., 2d Sess. 2.)

D. DISPOSAL OF SURPLUS POWER AT WILSON DAM

Three measures, and only three, providing definitely for the disposal of power at Wilson Dam were approved by both houses of Congress. Each of these measures provided for operation of the dam by the Government and sale by the Government of the surplus energy generated there. The first, passed in 1928 (69 Cong. Rec. 9842, 9957), failed to become law because of a pocket veto; the second, passed in 1931 (74 Cong. Rec. 5346, 5708, 5716), was also vetoed (Sen. Doc. No. 321, 71st Cong., 3d Sess.); the third was the Tennessee Valley Authority Act of 1933.

These measures, in their provisions for disposal of Muscle Shoals power, followed the pattern set by the so-called Wadsworth Bill of 1919, described above, which authorized a government corporation to operate the Muscle Shoals hydroelectric plant then partially constructed, and to use and sell "the hydroelectric power to be developed under the authority of the Act of June 3, 1916 [National Defense Act]" (Section (e); 60 Cong. Rec. 812, 813). [25]

[25] The bill introduced in 1922 was stated to be identical in principle with the Wadsworth Bill of 1919. See Hearings before Senate Committee on Agriculture and Forestry, Part 2, 68th Cong., 1st Sess. 330; 62 Cong. Rec. 5216. The bill authorized construction or acquisition of transmission

The disposition of incidental power to render navigation and flood-control projects economically feasible has long been an established federal policy, as is evidenced in the history of the Muscle Shoals project itself (*supra* at 66, 70–71, 74; H. R. Doc. No. 395, 73d Cong. 2d Sess.; *Cf.* sections 9a, 12). Congress early concluded to make such disposition in a manner most consistent with a wide distribution of the benefits. A provision for equitable distribution was early demanded in the interest of North Carolina, Mississippi, and Tennessee. (See Hearings before Senate Committee on Agriculture and Forestry, 68th Cong., 1st Sess., 301–309, 340–345, 373–386, 949–950; 67 Cong. Rec. 4986.) In 1926, such a provision was imposed as a condition of any proposal for the disposition of the Muscle Shoals properties. (See H. R. Con. Res. No. 4, 69th Cong., 1st Sess.) An important consideration in the rejection of the offers for private operation was the failure to guarantee wide-spread distribution of the

lines. The bill introduced in 1933 (S. 1272, 73d Cong., 1st Sess.), which, together with H. R. 5081, became the Tennessee Valley Authority Act, was in its provisions regarding Muscle Shoals "practically the same bill that the committee has reported at various times during the last 12 years." (Sen. Rep. No. 23, 73d Cong., 1st Sess. 1; Appendix B). The report on H. R. 5081 (H. R. Rep. No. 48, 73d Cong., 1st Sess. 2) stated:

"Twice in recent years, once in 1928, and again in 1930, bills were passed by Congress and sent to the President for his approval. Both those bills were very similar to the bill now reported favorably by your committee. And a large part of those bills was in the identical language of this bill." (See Appendix C.)

benefits of the surplus power and the likelihood that it would be utilized exclusively by a local electrochemical industry (Sen. Rep. No. 831, 67th Cong., 2d Sess. 31–32; Sen. Rep. No. 678, 66th Cong., 1st Sess. 12; Sen. Rep. No. 672, 69th Cong., 1st Sess. 12).

There was a wide-spread conviction in Congress that the power at Wilson Dam could not be disposed of in the public interest by dealing with the Alabama Power Company, the only available private agency. This conviction was manifest even before the construction of the dam. Beginning prior to 1912, the Power Company and its associates were actively interested in developing the Muscle Shoals power under conditions of monopoly through financial subsidy from the Federal Government. The Muscle Shoals Hydroelectric Power Company, which became a subsidiary of the Alabama Power Company in 1912 (Hearings before House Committee on Military Affairs, 67th Cong., 2d Sess., 779–780), had for several years prior thereto been advocating the development of the Muscle Shoals region for power purposes (*id.* at 779). As has already been stated (*supra* at 70, 71), the Muscle Shoals Company offered to "cooperate" with the Federal Government in the development of a combined navigation and power project at Muscle Shoals. The disapproval by Congress of this joint scheme of development has previously been noted. This disapproval was again made manifest in the consideration of the National Defense Act of 1916,

when the House rejected a proposal (introduced as Section 82) authorizing the construction of facilities for the fixation of nitrogen in cooperation with private industry. The proposal was denounced as Muscle Shoals in a new garb (53 Cong. Rec. 4724–4730). From 1919 to 1922 the southeastern companies opposed the construction of Wilson Dam by the Government, contending that there was no market for the power.[26]

The experience of Congress after the completion of the dam in 1926 made it clear that the provisions for the disposal of the power under the National Defense Act were not adequate to avoid monopoly or waste of the power and to assure the public of its full benefit. (See Appendix D;[27] Hearings before House Committee on Military Affairs on S. J. Res. 46 (1928), 70th Cong., 1st Sess. 8, 9, 10, 12.) The Alabama Power Company, with its associates, dominated the power market within transmission distance of Wilson Dam (Def. Ex. 98, R. 962; R. 958–964). The only surplus energy disposed of was that purchased by the Company (74 Cong. Rec.

[26] See Hearings before Senate Committee on Agriculture and Forestry, 66th Cong., 2d Sess. 350, 352; Hearings before House Committee on Military Affairs, 67th Cong., 2d Sess. 99, 100; H. R. Rep. No. 1084, 67th Cong., 2d Sess. 52; Sen. Rep. No. 980, 69th Cong., 1st Sess. 201–203.

[27] This Appendix contains excerpts from official reports and congressional debates regarding necessity for transmission lines.

Mention should be made of the offer of the Alabama Power Company and its associates to pay annually $2,200,000 for the Wilson Dam power and lease of the Sheffield steam plant, subject to cancellation on eighteen months' no-

3385). Between 1926 and 1933, as has been shown, *supra* at 19, by far the greater amount of the power at the dam was wasted.

The disadvantageous position of the United States in its relations with the Power Company without facilities for reaching other purchasers was obvious. The surplus energy was disposed of to the Power Company at an average price of two mills per kwh. (74 Cong. Rec. 3385). When the War Department, believing that the energy was worth more than the Company had been paying, attempted to raise the price to four mills, the Company threatened to withdraw entirely (68 Cong. Rec. 4743; Hearings before House Committee on Military Affairs, 1928, 70th Cong., 1st Sess., 436–437). The War Department felt compelled to refuse the request of the town of Muscle Shoals and other cities in northern Alabama for power from the fear that, if the Government granted the

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tice. The offer was made to the Secretary of War in 1928, on the eve of the passage of S. J. Res. 46, providing for government operation. Apparently it was never referred to Congress until January 1931 (R. 529), after both Houses had twice passed bills authorizing government operation. The objection to the other offers because of monopoly of the benefits is, of course, applicable to this one. Although the offer was more attractive financially than those of other bidders, it should be noted that the Army engineers valued the Wilson Dam power at $2,500,000 (H. R. Doc. No. 328, 71st Cong., 2d Sess. 525). The offer contained no provision for increased payment in the event of construction of Cove Creek Dam, although its construction would add 40,000 kw. firm power at Wilson Dam (R. 836). Moreover, the offer required eighteen months' notice of cancellation (*cf.* Section 20 of the present Act).

requests, the Alabama Power Company would purchase no energy whatever (69 Cong. Rec. 4332, 4456).

It was generally recognized in Congress that if the Government continued to be confined to dealing with the Alabama Power Company, that company would not make the full benefits of the cheap power available to the public. (See e. g., Hearings before House Committee on Military Affairs on S. J. Res. 46 (1928), 70th Cong., 1st Sess. 8, 9, 10, 12; 70 Cong. Rec. 4547; 74 Cong. Rec. 3385.) The Company's representative had testified in 1924 that in the future rates would go up and not down. (See Hearings before Senate Committee on Agriculture and Forestry, 68th Cong., 1st Sess. 886–887.) Meanwhile, ninety-seven percent of the rural residents in the territory surrounding Wilson Dam were without electric service of any kind (Fdg. 123, R. 1083).

In these circumstances, disposal of the power by a government agency appeared to be the most appropriate solution. It was felt by some members of Congress, moreover, that the Government, owning the dam and power plant, had not only a duty to distribute the full benefits of the power widely but also an opportunity to demonstrate the true costs of the production and distribution of electricity, that is, to provide a "yardstick" for utility operations. (See 67 Cong. Rec. 4913–4914; 69 Cong. Rec. 3760.)

Authority to acquire transmission lines was found indispensable for the disposal of power by a government agency (Appendix D). The position of the Federal Government in its relations with the Alabama Power Company had made this clear. The Tennessee Valley Authority Act embodies the conclusion of Congress that monopoly of the power at Wilson Dam was to be avoided; that its benefits were to be broadly distributed and a fair return earned; and that for this purpose it was essential that authority to acquire transmission lines be given to a government agency. The policy of the Act in this regard is stated explicitly in Sections 10, 11, and 12. The position of the rural and domestic consumers is emphasized.

Section 10 declares the policy of giving a preference in the sale of electricity to states, counties, municipalities, and cooperative organizations of citizens and farmers not organized or doing business for profit but primarily for the purpose of supplying electricity to its own citizens or members. The same section empowers the board to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates in order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines. The section further authorizes the board to make studies and experiments to promote the wider and better use of electric power.

Section 11 declares the policy of the Government to distribute and sell the surplus power generated at Muscle Shoals equitably among the states, counties, and municipalities within transmission distance. Section 11 adds that the projects provided for shall be considered as primarily for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available.

Section 12 authorizes the acquisition of transmission lines "in order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power." Thus the purposes of Congress in authorizing the acquisition of transmission lines, which are apparent from the legislative background, are not left merely to inference; the purposes are plainly set forth in the Act.

III

The Transaction Here Challenged Is Within the Constitutional Powers of the Federal Government

It is the position of the Authority that, under the Commerce and War Powers and the Property Clause of the Constitution, the Government may dispose of any surplus power created by the construction and maintenance of Wilson Dam; and further, that the conversion of the water power into electricity and the transmission of the energy to the market for sale are lawful means of disposition, particularly since the power plant is already being main-

tained in the interest of national defense. This is in accord with long established practice. Apparently, petitioners urge that the Federal Government many not dispose of the power, and that the only disposition which the Government may make of the Wilson Dam power plant, apart from sale, is to lease the emplacements, the right of the lessee to utilize the available power to depend upon obtaining a license from the State of Alabama.

A. UNDER THE COMMERCE CLAUSE THE FEDERAL GOVERNMENT MAY DISPOSE OF THE WATER POWER NECESSARILY CREATED BY WILSON DAM AND MAY AUTHORIZE GENERATION OF ELECTRIC ENERGY AND ACQUISITION OF TRANSMISSION LINES AS MEANS OF DISPOSAL

1. The Federal Government may dispose of the water power created by a navigation dam constructed, owned, and maintained by it

The authority of the Federal Government to dispose of the water power created by a dam owned and maintained by the United States for the purpose of improving navigation has been settled by an unbroken line of decisions of this Court, culminating in *Arizona* v. *California*, 283 U. S. 423. (See *Kaukauna Water Power Co.* v. *Green Bay & Miss. Canal Co.*, 142 U. S. 254; *Green Bay & Miss. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, *rehearing denied*, 173 U. S. 179; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53.)

These decisions are based on the principle that the right to dispose of the water power created by a

navigation dam accompanies the legitimate ownership and maintenance of the dam itself. This conclusion was established in the case of a navigation dam maintained by a state in *Kaukauna Water Power Co.* v. *Green Bay & Miss. Canal Co., supra,* decided in 1891. There a dam was constructed, under authority of state law, at the head of a rapids, forming a pool from which a portion of the water was diverted into a canal alongside the stream. The state statute reserved to the state any water power created by the erection of the dam. The canal company, maintaining the dam and claiming the right to dispose of all the resulting water power under a grant by the state, sued to enjoin the water power company, a riparian proprietor, from drawing water from the pond and using it for hydraulic purposes. The defendant challenged the state law and the proceedings under it as a taking of property for a private use, in so far as the law reserved to the state the water power resulting from so much of the water impounded by the dam as was not devoted to maintaining the navigability of the canal. This Court upheld the authority of the state to "retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement" [28] (p. 273).

[28] The state supreme court had upheld the right of the state solely as an incident to the navigation improvement. 70 Wis. 635, 35 N. W. 529. This Court pointed out that in Wisconsin the appropriation of riparian rights in water

* * * But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to draw—controversies which could only be avoided by the State reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement.

The value of this water power created by the dam was much greater than that of the

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power solely for a power project would probably have been beyond the competence of the state (142 U. S. at 272–273). As pointed out by brief of petitioners (p. 136), in Wisconsin the riparian proprietor owns to the middle of the stream, and the state has no proprietary right in the waters."

> river in its unimproved state in the hands of the riparian proprietors who had not the means to make it available (*id.* at 273).

The United States has a similar right of disposal where the dam is owned and maintained by the Federal Government. This was clearly established in *Green Bay & Miss. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, *rehearing denied*, 173 U. S. 179, decided in 1898. There the United States had purchased the dam and other improvements from the canal company, the deed reserving to the latter, however, the water power created by the dam. The paper company, a lower riparian owner, sought an apportionment of the flow of the river for power purposes, objecting to the diversion through the navigation canals and around its properties of waters not required for navigation. The canal company, in a cross-bill, asserted that any decree must be made subject to its right to use all the water power created by the dam and improvements on the river. The canal company's claim was founded on the fact that the dam and improvements were being maintained by the United States, from which its right to the disposal of the water power derived. The Supreme Court of Wisconsin denied the prayer of the cross-bill, holding that the grant from the state conferred no right to divert the waters through the canal for power purposes (90 Wis. 403). The canal company appealed. In this Court a motion was made to dismiss the

appeal for lack of jurisdiction, the paper company contending that no federal question was involved. This Court entertained the appeal on the specific ground that the right of the canal company to the use and disposition of the water power depended on the federal grant, for the reservation in the deed was equivalent to a grant by the United States. The Court thus described the foundation of the claim to the water power (172 U. S. at 80):

> The substantial meaning of the transaction was, that the United States granted to the Canal Company the right to continue in the possession and enjoyment of the water powers and the lots appurtenant thereto, subject to the rights and control of the United States as owning and operating the public works * * *.

The legal question, therefore, was the right of the United States to control and appropriate the water power created by the dam maintained by it (*id.* at 68–69):

> Whether the water power, incidentally created by the erection and maintenance of the dam and canal for the purpose of navigation in Fox River, is subject to control and appropriation by the United States, owning and operating those public works, or by the State of Wisconsin, within whose limits Fox River lies, is the decisive question in this case.
>
> Upon the undisputed facts contained in the record we think it clear that the Canal Company is possessed of whatever rights

> to the use of this incidental water power that could be validly granted by the United States.

This question was answered by the Court as follows (p. 76):

> It is apparent from the conceded facts that the water power in question did not exist while the stream was in its natural condition. Nor was it created by the erection of a dam by private persons for that sole purpose. * * *
>
> But we have here the case of a water power incidental to the construction and maintenance of a public work and, from the nature of the case, subject to the control of the public authorities, in this instance the United States.

The authority of the United States to control and dispose of the entire water power created by the dam was squarely sustained by this Court, despite the finding of the state supreme court that only one percent of the flow of the stream was required for navigation, the diversion of the remaining ninety-nine percent being "*ex industria,* for the purpose of creating water power" (90 Wis. 370, 398, 401, 61 N. W. 1121, 1122, 1124).[29] This Court

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[29] The state court was of opinion, however, that water power created not by diversion of the water from the stream but by the flow over the dam (as is the situation at Wilson Dam) is "in a true sense, incidental to the erection of the dam" (90 Wis. 401, 61 N. W. 1121, 1124).

quoted with approval the reasoning in the earlier *Green Bay* case, 172 U. S. 58, 78, that in the interest of avoiding waste or providing reimbursement for the cost of the improvement, the ownership and maintenance of a navigation dam carries with it the right to dispose of the resulting water power. Pointing out that "the water power in question did not exist while the stream was in its natural condition" (p. 76), this Court concluded that the use and disposal of the water power at a federal navigation dam "fall within the sole control of the United States" (p. 80).

If any doubt could have existed concerning the meaning of this Court's decision in the *Patten* case, it is dispelled by the opinion denying a petition for rehearing (173 U. S. 179). In answer to the assertion that the rights of lower riparian owners to a division of the waters had not properly been determined, Mr. Justice Shiras said:

> While the courts of the State may legitimately take cognizance of controversies between the riparian owners, concerning the use and apportionment of the waters flowing in the non-navigable parts of the stream, they cannot interfere by mandatory injunction or otherwise with the control of the surplus water power incidentally created by the dam and canal now owned and operated by the United States (p. 190).

Petitioners apparently acknowledge that this opinion on rehearing is apposite to the case at bar, and are forced to the position that the language

of the opinion was "too broad" and "not necessary to decision" because the canal company had "acquired all water rights at and above the dam" (brief, p. 141). But this suggestion does not explain the paramount right of the canal company as against lower riparian owners, and it wholly ignores the crucial fact that the source of the company's rights was the grant from the United States.

The right of the United States to dispose of the water power at a federal navigation dam was confirmed in *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. An Act of March 3, 1909 (35 Stat. 815) authorized the Secretary of War to condemn property for navigation improvements and to lease any excess of water power over the needs of the Government resulting from the navigation works constructed. In condemnation proceedings by the United States, the company claimed damages for the taking of water-power rights in excess of navigation needs, contending, among other things, that in authorizing the lease of the water power the act (Section 11) authorized a taking of private property for commercial use.[30] This contention was disposed of by the Court in these words (p. 73):

> If the primary purpose is legitimate, we can see no sound objection to leasing any

[30] The District Court found as a fact that it was necessary to take only a small portion of the total flow of the river for navigation purposes in connection with the canal. (See Record in No. 783, October Term, 1912, at 330, and the opinion of the District Court, *id.* at 408.)

> excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by state governments" (citing *Kaukauna Co.* v. *Green Bay & Miss. Canal Co.*, 142 U. S. 254, 273).

The Court further held that no compensation was required to be given by the United States on account of its acquisition of water-power rights. In this respect the decision necessarily qualifies the statements in the *Green Bay* case, emphasized by petitioners (brief, pp. 137–140), which intimated that the compensation there offered by Congress was constitutionally necessary.

The right of the United States to dispose of water power at a navigation dam was reaffirmed by this Court in *Arizona* v. *California*, 283 U. S. 423, sustaining the construction by the Secretary of the Interior of a dam, reservoir, and power plant in connection with the Boulder Canyon project.[31]

The Boulder Canyon Project Act (45 Stat. 1057) imposed as a condition precedent to the construction of these works the execution of contracts by the Secretary which would be adequate in his judgment to reimburse the United States for costs of the project. The bill of complaint filed by Ari-

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[31] The existence of a state compact was, of course, immaterial on this issue, as against the objection of Arizona, the non-assenting state in which the dam was built.

A second issue in the case, held to be prematurely raised, involved the diversion of waters for purposes of consumption. That issue has no relevance here.

zona in that case pointed out that prior to the suit the Secretary had concluded a fifty-year contract with the Metropolitan Water District of California for the sale of electric energy (Record in No. 19, Original, October Term, 1931, at 36). In an appendix to the bill of complaint were set out so-called "Power Regulations of the Secretary of the Interior", which described additional contracts between the Secretary and the City of Los Angeles and the Southern California Edison Company, providing, among other things, that the company and city should act as "generating agencies" and transmit energy to certain prospective purchasers who would contract directly with the Secretary for the purchase of electricity (*id.* at 90–91; 108–109). Allocations for the purchase of electricity had been made by the Secretary to eleven municipalities (*id.* at 96). The bill of complaint urged that the purpose of the project was to put the Government in "the business of generating and selling electric power" (*id.* at 31). Without reviewing in detail the basis of its earlier decisions, this Court reiterated the governing principles applicable to the case and rejected the contention of Arizona (283 U. S. at 455–456):

> As the river is navigable and the means which the Act provides are not unrelated to the control of navigation, *United States* v. *River Rouge Improvement Co.*, 269 U. S. 411, 419, the erection and maintenance of such dam and reservoir are clearly within

> the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary, is not for this Court to determine. * * * And the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power.

In the face of these decisions, the petitioners contend that the Federal Government is without authority to dispose of the water power created at Wilson Dam. In support of this contention they invoke the decisions in *Pollard* v. *Hagan,* 3 How. 212; *Shively* v. *Bowlby,* 152 U. S. 1; *Port of Seattle* v. *Oregon-Washington Ry.,* 255 U. S. 56; and *Wisconsin* v. *Illinois,* 278 U. S. 367. These decisions obviously have no application to the case at bar.

The first three decisions cited deal with the rights of a state in the bed and waters of navigable streams in the absence of any question of the right of the United States to dispose of water power made available by its own navigation dam. The second *Green Bay* case, 172 U. S. 58, discussed *supra,* makes it clear that where water power is so created, the right of the Federal Government cannot be questioned, since in such matters there can be "no divided empire":

> At what points in the dam and canal the water for power may be withdrawn, and the quantity which can be treated as surplus

> with due regard to navigation, must be determined by the authority which owns and controls that navigation. In such matters there can be no divided empire (p. 80).

The division between federal and other rights where a federal dam is being maintained was clearly stated by the Court (173 U. S. at 190):

> The purport of our decision was to preserve to the Green Bay & Mississippi Canal Company the use of the surplus waters created by the dam and canal. After such waters had flowed over the dam and through the sluices, and had found their way into the unimproved bed of the stream, the rights and disputes of the riparian owners must be determined by the state courts.

Furthermore, reliance on the decisions invoked by the petitioners indicates a misconception of the right which is claimed by the United States. The Federal Government does not here assert ownership of the waters of the Tennessee River. Its rights, if any, in the water and bed of the stream, apart from its construction of the dam, must be determined by local law. In this connection it may be noted, in passing, that the United States is a riparian owner at Wilson Dam (*supra* at 18). The claim of the United States is directed to the disposal of the water power which owes its creation, as the Court pointed out in the *Green Bay* cases, to the construction and maintenance of the dam and the flow of the stream over the head of that dam.

Particular reliance is placed by the petitioners upon the case of *Wisconsin* v. *Illinois*, 278 U. S. 367 (brief, pp. 132–134). In that case no federal navigation improvement by the erection of a dam or other structure was involved. The case dealt with the diversion of waters from the Great Lakes by the State of Illinois. The Court held that this diversion, as found by the special master, was effected primarily for the purpose of sanitation; that there was no congressional action authorizing a diversion of the waters in the interest of a navigable waterway from the Lakes to the Mississippi; that in fact the United States had sought to enjoin the defendants from the excessive diversion; and that a permit from the Secretary of War, relied on by the defendants, was temporary and conditional, and was issued only in order to prevent the closing of the Port of Chicago because of the deposit of sewage for which the defendants were responsible. Manifestly that decision is not pertinent here. Wilson Dam was erected and is maintained and operated to serve legitimate federal functions, including the improvement of navigation. No diversion of waters from the navigable stream occurs. The dam forms a navigable pool extending fifteen miles upstream, and all the waters flow over the dam. The Federal Government asserts only the right to have these waters pass through penstocks in the dam rather than over the dam itself, and to use rather than waste the power resulting from that flow, which amounts to 50,000

kilowatts of continuous capacity (Fdg. 50, R. 1049). The slack-water development created by Wilson Dam, replacing the old lateral canals which had been ineffectual, was the only feasible means of eliminating the most serious obstruction to navigation on the Tennessee River (Fdg. 131, R. 1082). It should be added that even were there a diversion of waters, the decisions of this Court in the *Green Bay* cases, 172 U. S. 58, 142 U. S. 254, established the right of the lessee of the Government to divert waters for power use in connection with a federal navigation improvement. *Wisconsin* v. *Illinois,* 278 U. S. 367, finally, expressly approved the decision in the *Chandler-Dunbar* case.

No misapprehension as to the meaning of this Court's decisions discussed above has existed in the lower federal courts or in the opinions of lawyers who have been concerned with the question as officers of the Government. In *Waters* v. *Phillips,* 284 Fed. 237 (C. C. A. 7th), for example, the court sustained the right of the United States to lease the water power at a navigation dam to a private agency for the purpose of generating electricity. The issue was stated by the court to be, upon analysis, "the right of the United States to use its head of water for purpose of generating electrical power" (pp. 238–239). In answer to the objection of an adjoining landowner, the court said:

> * * * when the United States, in the lawful exercise of its authority, builds a dam for purposes of navigation, the water power

> thus developed may be lawfully used by the United States, or leased to any concern engaged in the development and distribution of power or electrical current. In other words, there was no need for the potential power residing in this pond to go to waste, and we can see nothing objectionable, but everything commendable, in the policy of the government in permitting a lessee or licensee to convert such power into electrical current. *U. S.* v. *Chandler-Dunbar,* 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063 (p. 239).

Other federal courts have acted upon the same principles. *Cf. United States* v. *Shyrock,* 162 Fed. 790 (S. D. Ohio); *Alabama* v. *United States,* 38 F. (2d) 897 (Ct. Cl.), *dismissed for want of jurisdiction,* 282 U. S. 502; *Alabama Power Co.* v. *Gulf Power Co.,* 283 Fed. 606 (D. C. M. D. Ala.); *Buchanan* v. *United States,* 78 Ct. Cl. 791, *cert. denied,* 294 U. S. 723. The right of the United States to dispose of the water power created by its navigation dams has been a recognized basis of congressional action for half a century.[32] This authority has been regarded as free from doubt by the most eminent constitutional lawyers in the Government for three decades. The fact that in this way the United States is reimbursed in part for the im-

[32] Act of August 11, 1888 (25 Stat. 400, 417); Act of September 19, 1890 (26 Stat. 426, 447); Act of June 28, 1902 (32 Stat. 408, 409); Act of June 25, 1910 (36 Stat. 630, 668–669); Act of December 21, 1928 (45 Stat. 1057).

provement, making such improvements more economically feasible, has been an important consideration, and was referred to in the *Green Bay* cases (142 U. S. 254, 272, 273, 274; 172 U. S. 58, 76, 77, 78), though no such specific provision was contained in the Act of 1909 sustained in the *Chandler-Dunbar* case, 229 U. S. 53.

In view of the foregoing decisions of this Court, which have been repeatedly acted upon, we submit that the right of the United States to dispose of the water power created by a federal navigation dam is not subject to question.

Petitioners, in the foreword to their brief and intermittently throughout, treat the Authority's case as resting in part upon a claim of ownership of waters as such. They conjure up claims to the "energy of the flowing waters" (p. 1), to "the proprietary rights in running waters" (p. 120), to "absolute control and disposition of all surplus waters" (p. 130), and to the diversion of waters for such purposes as sanitation or irrigation (p. 132). The suggestion is repeated (e. g., p. 58) that the Authority may legally manipulate only such waters as are necessary to actuate the locks.

Plainly, there is no available energy in the *flowing* waters. The Authority does not base its case upon the assertion of the right either to take or divert waters or upon any proprietary right in running waters. Petitioners properly state (p. 145) that "in constructing a dam, the Government

does not create water. It merely concentrates water." Obviously, it thus creates a navigation pool and concentrates the fall of the water at one place. The maintenance of the pool, and not the mere actuation of the locks, is the essential navigation service. This important navigation facility unavoidably forms a head of water at the dam, where as the water moves downstream it falls over the dam. Power is inevitable. This power must be utilized then and there or it is forever lost. Use of this power thus created by the navigation dam and pool leaves the water as beneficial to others as if the power in the waterfall had been uselessly spent on the river bed.

2. Generation of electric energy and acquisition of transmission lines are appropriate means of disposing of the water power at Wilson Dam

The only remaining question in connection with the navigation powers of Congress concerns the choice of means by Congress for the disposal of the water power at Wilson Dam. We submit that the means adopted in this regard are peculiarly appropriate.

It is a matter of common knowledge that the utilization and disposal of water power is a usual incident to the maintenance and operation of a large dam. "In fact", as was said in *Waters* v. *Phillips*, 284 Fed. 237, 239, "it would be the unusual and rare exception to find a large and expensive dam constructed and a large pondage created without an

attending power plant to utilize the potential power of the passing water." The modern and customary method of disposing of water power is by generation and transmission of electric energy. In earlier days, when the power in the falling water could be transmitted no further than the length of a shaft attached to the water wheel, the owner of a dam commonly utilized the water power himself, or leased it for use at the site, or diverted a small amount of water for power uses nearby. The early uses of water power, however, have been changed as engineering science has discovered means of transforming kinetic energy into electric energy. Consequently, water power is used today almost wholly in the form of electric energy; indeed, the extensive development of water power in this century has been due almost wholly to the perfection of means for the long-distance transmission of electric energy. (See Rushmore and Lof, *Hydro-electric Power Stations* (2d ed.) c. 1.) We are now accustomed to think of the power at a navigation dam not in terms of kinetic energy but rather in terms of electric energy transmitted by wires to users located at a distance.

The various means chosen by Congress to dispose of the surplus power at government navigation dams have paralleled scientific development. As early as 1888, Congress authorized the Secretary of War to dispose of the power by diverting the surplus waters impounded at federal navigation dams

on the Muskingum River and leasing the use of the waters to private users (25 Stat. 400, 417).

It then became a common practice to dispose of the water power by these means (*infra* at 140).

The courts have uniformly approved these various means chosen by Congress to dispose of the incidental power. This Court has recognized the right of the Government, or its grantee, to divert water for power uses from its natural course through a canal and thence divert it from the canal returning it to the main stream below the protesting riparian owner's property (*cf. Green Bay & Miss. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, *rehearing denied*, 173 U. S. 179).[33]

In 1912, Congress enacted a general measure for the conservation of power at all federal navigation dams by authorizing the construction of facilities in the dam itself for utilizing and disposing of the power as electricity (37 Stat. 201, 233). This inaugurated the accepted federal legislative and administrative practice of installing emplacements and sluiceways for power development at federal navigation dams.

The National Defense Act of 1916, the Boulder Canyon Project Act, and the Tennessee Valley Authority Act, the present-day descendants of the old leasing statutes, are examples of congressional efforts to deal with the navigation-power relation-

[33] For a full explanation of mode and circumstance of the diversion, see the opinion of the state supreme court in this case. 90 Wis. 370, 61 N. W. 1121, 1122–1124.

ship in the light of scientific progress. Under the National Defense Act the employment of generation as a means of disposing of the power available at Wilson Dam in the form of electric energy to the Alabama Power Company was never questioned.

The Boulder Canyon Project Act gave the Secretary of the Interior a wide choice of means to dispose of power (Sections 4, 5, 6). He was authorized to make contracts for the sale of electrical energy or the use of water for power purposes. He was authorized to install generating equipment and operate it. Or he could, in his discretion, enter into contracts of lease of a unit of any government-built plant, with the right to generate electrical energy or, alternatively, enter into contracts of lease for the use of water at the dam for the generation of electrical energy. The Boulder Canyon Project Act provided for the means of transmission as well as generation (Section 5 (d)). It provided that any agency which should receive a contract for electrical energy in a large bulk (100,000 firm horsepower) could be required by the Secretary to permit purchasers of smaller amounts of power to use their transmission lines upon the payment of a reasonable share of the cost of construction, operation and maintenance.

The significance of these provisions in the Boulder Canyon Project Act becomes obvious when the legislative history of that act is examined.

The construction of a power plant by the United States at Boulder Dam had been strongly urged by the Secretary of the Interior, who disapproved a previous bill for a project there on the ground that it included no provision for such a plant. (See Sen. Rep. No. 592, 70th Cong., 1st Sess. 31.) In the utilization of the electric power to be generated by this plant, the objectives of Congress were clearly stated. The report of the Senate Committee on the project explained that the allocation of power which was contemplated would avoid danger of monopolization:

> The plan of the Boulder Canyon Project, as expressed in the bill, contemplates allocation of the power or power rights at Boulder Canyon amongst various agencies, including States, political subdivisions, municipalities, domestic water-supply districts, and private companies.
>
> * * * * *
>
> With such a distribution of power or power rights at the dam, all danger of monopolization will be avoided, and there will be created a sound competitive condition between these various agencies which will insure the consuming public protection in the form of reasonable rates and good service (*id.* at 26–27).

The report of the House Committee enunciated the same objective (H. R. Rep. No. 918, 70th Cong., 1st Sess. 22):

> There were many indications in the testimony adduced before the committee that

there would be considerable competition to secure this very desirable power. The committee has so framed the legislation to guard as fully as might be against this asset, created by Federal initiative, being monopolized by any one agency. The bill contemplates that the power will be fairly and equitably distributed amongst the various agencies applying therefor, thus insuring the widest and fairest possible distribution of the benefits.

In entering into the contracts which, under Section 4 (b) of the Act, were a condition precedent to the building of the structures, the Secretary of the Interior was careful both to assure adequate return to the Government and at the same time to avoid monopolization of the benefits of the power. As actually consummated prior to the appropriation for the project, these contracts established the City of Los Angeles and the Southern California Edison Company as generating agencies to satisfy the requirements of contracts made and to be made by the Secretary with other purchasers. At the outset, the Secretary contracted with the Metropolitan Water District as such a purchaser. Later, in 1933, it was stated that five additional purchasers had entered into contracts with the Secretary which the generating agencies were obligated to satisfy. (See Wilbur and Ely, *The Hoover Dam Power and Water Contracts* (United States Department of the Interior, 1933) p. 45.) The gen-

erating costs attributable to the energy delivered to these allottees are to be repaid to the generating agencies by the United States in the form of deductions upon their obligations to the Government, and the United States undertakes to collect these costs from the allottees (*id.* at 50).

The Secretary of the Interior, in reporting on the original contracts to the Senate Committee on Appropriations in 1930, explained that "a wide regional benefit from this power was desired and obtained" (*id.* at 601). He stated that ninety-one percent of the firm energy was allocated to public agencies to be generated at the dam by the City of Los Angeles; and that the remaining nine percent was allocated to "four public utilities who alone can serve the great agricultural back-country" (*ibid.*). The Secretary added, significantly, that this wide distribution was not possible if the public agencies were required to obligate themselves immediately for the purchase of power. Nevertheless, the Act required firm contracts in advance of congressional appropriation. The interests of adequate return to the Government were reconciled with wide-spread distribution of the benefits of the power by requiring the two generating agencies to underwrite the entire amount of firm energy required to reimburse the Government as provided by statute. This amount constituted sixty-four percent of the available firm energy; the City was required to underwrite purchase of thirty-seven percent and the Company twenty-seven percent of

such power, but they acquired title to only thirteen percent and nine percent, respectively, the balance being available to them only until the states and municipalities might need it (*ibid.*).

Thus Boulder Dam, unlike Wilson Dam, was constructed under a plan of divided operation. Such a plan may give rise to complexities and conflicts. In 1926, Secretary of Interior Work foresaw the possibility of such difficulties and recommended the building of a unified power plant by the United States. See H. R. Rep. 918, 70th Cong., 1st Sess. 26–27.

The problem thus presents difficulties of a practical nature which can hardly be solved by a rule of thumb. If dual or multiple operation at Boulder Dam may entail such difficulties, it is fair to suppose that they would be greater at Wilson Dam, which was built for unitary operation.

The constitutional issue of the choice of means is a narrow one. It cannot seriously be maintained that while the determination of Congress to employ independent contractors to serve the contracts of the Government with purchasers of electricity is wholly reasonable, a determination of Congress to employ its own officers for the same purpose is wholly capricious. Assuredly, no such dichotomy can be read into the Federal Constitution.

Previous experience in selling power at Wilson Dam and the other circumstances above recounted, *supra*, at 78–83, demonstrated to Congress the necessity for authorizing a federal agency to construct

or acquire transmission lines in order to assure an equitable distribution of the benefits of the power among states and purchasers, and in order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power (Sections 10, 11, 12).

The transmission lines in suit are essential in connecting Wilson Dam, located as it is in the extreme northwestern part of Alabama, and the area in the surrounding states (Fdg. 121, R. 1080; R. 959, 960, 961, 963). One of the lines in suit extends from Wilson Dam across the Alabama boundary into Mississippi, and another is connected to a line which is interconnected with the Tennessee Valley Authority line crossing the Alabama boundary into Tennessee (Def. Ex. 97, R. 958). It is to be noted, therefore, that in one aspect these lines are instrumentalities which promote the interstate transmission of electric energy. *Cf. California* v. *Central Pac. R. R. Co.*, 127 U. S. 1, 39; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525.

The legitimacy of the means thus adopted by Congress is evident, we submit, from the facts; and it is fully supported by the principles established by this Court. The means are not only appropriate, but they are an ordinarily related incident of the maintenance of a large dam. In other fields of federal action, such as the granting of trust powers to national banks (*First National Bank* v. *Fellows*, 244 U. S. 416) and conferring power to irrigate

private lands as well as public lands (*Burley* v. *United States*, 179 Fed. 1 (C. C. A. 9th)), the means employed have been uniformly sustained where they constitute such incidents of the activity and add to the feasibility of the project.

The Constitution no more requires the Federal Government either to refrain from using the surplus water power at Wilson Dam or to lease or sell it to others for conversion into electricity than it required the Bank of the United States either to refrain from using government deposits or to lease to others the privilege of converting those deposits into commercial loans.

Such activities, like the one here in question, are related to the performance of governmental functions; they are not extensions of the regulatory power of Congress. In undertaking these activities, Congress has uniformly been allowed to choose means which may be deemed appropriate to the carrying out of its great functions. There is no occasion, we submit, to overturn that choice where it is an outgrowth of practical necessity demonstrated by experience, and where it was impelled by objectives which it is the power, and indeed the duty, of Congress to promote.

B. UNDER THE WAR POWERS THE FEDERAL GOVERNMENT MAY AUTHORIZE GENERATION OF ELECTRIC ENERGY AND ACQUISITION OF TRANSMISSION LINES AS MEANS OF DISPOSAL OF THE SURPLUS POWER AT WILSON DAM

Wilson Dam and its appurtenant hydroelectric power facilities were constructed for the purpose

of providing a permanent supply of electric energy for the manufacture of war explosives. Its present war-time importance requires that the dam, together with the other Muscle Shoals properties, be retained in the interest of the national defense. Under these circumstances the reasons for disposing of the surplus power at Wilson Dam in the form of electricity are particularly compelling. The case presented is one of continually wasting electricity, the conversion of the water power into electricity by means of available generators involving only a simple mechanical act. The generation of electricity by the Authority is the more reasonable—perhaps the only reasonable—course, in view of the fact that the Congress has entrusted the Muscle Shoals properties to the Authority to maintain and operate them in such manner as will prevent their deterioration and preserve their usefulness for war purposes. The nature of the properties requires that they be operated as a unit and renders impracticable the leasing of any surplus plant capacity at Wilson Dam for private power operation. The contentions of the petitioners that the Muscle Shoals properties are no longer a valuable national defense asset or that their maintenance by the Authority has no relation to the disposition of surplus power in the manner provided by the Act are, as we shall show, wholly untenable.

Section 124 of the National Defense Act of 1916 was enacted in response to a recognized need for a

permanent domestic supply of war explosives.[34] It is significant to note that this provision was enacted in peace time to meet a permanent need (H. R. Rep. No. 297, 64th Cong., 1st Sess. 2). Extensive investigations were conducted to determine the most feasible processes for the fixation of nitrogen (War Dept. Rep. No. 2041 (1922), p. 262 *et seq.*). The location for the site of the plants was carefully considered. Muscle Shoals was selected because of the availability of an abundant supply of cheap power and its immunity from attack (*id.* at 267; H. R. Doc. No. 119, 69th Cong., 1st Sess. 15). "The Tennessee Valley is the only absolutely self-contained, protected munitions center in the United States" (R. 915).[35] The Muscle Shoals properties were completed at a total cost of $136,902,000. (R. 707) and include Wilson Dam, the largest masonry dam in the world at the time of its construc-

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[34] See H. R. Rep. No. 297, 64th Cong., 1st Sess. 2; War Dept. Rep. No. 2041, p. 261, referring to Report of the Chief of Ordnance for 1916. No less than ten bills were introduced in Congress in 1916 to solve the problem: S. 4971, 53 Cong. Rec. 3882; S. 5378, 53 Cong. Rec. 5408; S. 5316, 53 Cong. Rec. 5134; S. 5069, 53 Cong. Rec. 4110; H. R. 13169, 53 Cong. Rec. 4100; H. R. 12368, 53 Cong. Rec. 3221; H. R. 13719, 53 Cong. Rec. 4887; H. R. 13346, 53 Cong. Rec. 4362; H. J. Res. 189, 53 Cong. Rec. 4887; H. R. Res. 194, 53 Cong. Rec. 5619.

[35] The Report of the House Committee on Military Affairs on the present Act declared:

"The Muscle Shoals property is situated far inland, where it is unlikely, if not impossible, that enemy airplanes or airships may ever destroy it by bombing from the air" (H. R. Rep. No. 48, 73d Cong., 1st Sess. 2).

tion, together with a power plant and eight generators (H. R. Doc. No. 119, 69th Cong., 1st Sess. 35), and Nitrate Plant No. 2, the newest and largest plant in the world for the fixation of nitrogen by the cyanamid process (R. 899–900).

After full testimony by responsible members of the War Department, in charge of war planning, the District Court made full findings that Wilson Dam, together with the nitrate plant, constitutes a valuable national defense asset (Fdgs. 38–48, R. 1046–1048; H. R. Rep. No. 48, 73d Cong., 1st Sess. 27). Nitrate Plant No. 2, with the aid of appurtenant power facilities, can be operated to produce annually 110,000 tons of ammonium nitrate, the principal inorganic compound used in modern warfare for explosives (Fdg. 38, R. 1046; R. 905, 923). The War Department today relies upon Nitrate Plant No. 2 for this amount of ammonium nitrate in the event of war (Fdg. 38, R. 1046–1047; R. 905). While there are methods more economical than the cyanamid process for the production of ammonia, the capacity for the conversion of ammonia into nitric acid and ammonium nitrate, the only useful form for war purposes, is insufficient in this country, as elsewhere, to meet war-time needs (R. 904, 925, 926). Should it be found desirable to do so, the properties can easily be altered to produce specific war materials of which there were shortages in the last war, such as white phosphorus, refractories, calcium carbide, ferro-alloys and abrasives,

the manufacture of which requires a large supply of electric energy (Fdg. 41, R. 1047; Fdg. 48, R. 1048; R. 908, 909, 919, 920, 927, 928). The availability of the Muscle Shoals properties for such purposes constitutes a valuable national defense asset (R. 906, 907, 908, 909, 912, 920, 927). The operation of the nitrate plant to produce ammonium nitrate by the nitrogen-fixing process would require the annual consumption of approximately 800,000,000 kwh. The operation of the electric furnaces to produce the other materials would require smaller amounts, varying according to the rate of production (R. 919, 920, 924).

The war-time importance of the Muscle Shoals properties is alone sufficient to explain the undesirability of disposing of the Wilson Dam power plant in peace times (H. R. Doc. No. 119, 69th Cong., 1st Sess. 3). The Congress has never given serious consideration to any form of disposition to private parties other than a limited lease subject to recapture.[36] The present Act directs that the Authority maintain Nitrate Plant No. 2 in stand-by condition (Section 5 (g)) and provides

[36] Offer of Henry Ford, H. R. Doc. No. 518, 68th Cong., 1st Sess., Sec. 16; offer of Union Carbide Co., Sen. Doc. No. 105, 68th Cong., 1st Sess., Sec. 13 at p. 8; offer of American Cyanamid Co., H. R. Doc. No. 16,614, 69th Cong., 2d Sess., Sec. E (3); offer of Associated Power Companies, H. R. Doc. No. 11,602, 69th Cong., 1st Sess., Sec. 20; offer of Farmers Federated Fertilizer Corporation, Sen. Doc. No. 4632, 69th Cong., 2d Sess., Sec. 84. For legislative action respecting these offers where formally proposed as bills, see Appendix F.

that any contracts for the sale of electric energy may be terminated in the event the power is needed for war emergency (Section 20).

The peace-time disposition of the surplus power thus created at Wilson Dam for war purposes does not differ in principle from the disposition of surplus war supplies (U. S. C., c. 50, Sections 62, 64–65, 68–72, 164; U. S. C., c. 10, Sections 1261–1262; U. S. C., c. 34, Sections 531, 533–539, 543–544). Indeed, there is a particularly compelling necessity for the disposition of surplus power in peace time. A hydroelectric plant acquired for war-time use is a war property *sui generis*. The ordinary fort, arsenal, or war-supply plant can be closed on the cessation of hostilities, the surplus products sold, the acquisition of raw materials arrested, and the minimal of economic waste prevented by the discontinuance of operations. But in the very existence of a hydroelectric plant, acquired and maintained for war purposes, an unused surplus of the usable product, power, will continually waste unless it is conserved and sold. Water power, convertible into electric energy, is a unique form of property. It is an inexhaustible, ever-recurring, and self-replenishing form of property. On the completion of Wilson Dam this property came into existence and will continue to endure. The forces of nature, unaided by human intervention, will continue to supply water to the hydroelectric plant, and the valuable property being thus

automatically created will be lost if it is not utilized as it comes into being.

There is every reason why this surplus power should be sold as electricity. The process of generation is an extremely simple one, it being necessary merely to open the penstocks and allow the water to course over the available turbines. The doctrine that the Government may dispose of wasting water power, announced in decisions of this Court already discussed, should here be applicable in the disposition of wasting electricity. It is true that the electricity is only potentially available until the generators are operated. But questions of constitutional power can hardly turn upon distinctions so fragile.

The generation of electricity by the Authority at Wilson Dam is indeed the only feasible means of disposing of the surplus power. The preservation of the war-time usefulness of the Muscle Shoals properties requires a peace-time operation by the Authority which precludes the leasing of any surplus plant capacity for private power operation.

Section 7 of the Act entrusts to the Authority "exclusive use, possession, and control" of all the properties at Muscle Shoals. The Authority is empowered to conduct experiments in the production of nitrates and other products useful for war purposes (Section 5 (h)), to manufacture explosives upon the request of the Secretary of War or the Secretary of the Navy (Section 5 (g)), to employ

all existing facilities to manufacture fixed nitrogen (Section 5 (d)), to improve existing facilities and add new plants (Section 5 (f)), and is further directed to maintain any unused portion of Nitrate Plant No. 2 in stand-by condition for war purposes (Section 5 (g)).

These provisions for the maintenance of the Muscle Shoals properties were the result of fifteen years of legislative consideration. As has already been noted, the first bill introduced in Congress to provide for the peace-time disposition of Muscle Shoals, the Wadsworth Bill of 1919, was based upon the principle that the peace-time operation of the properties was necessary to maintain the properties, together with a trained personnel, in readiness for war. (See *supra* at 76, 77.) The importance of the national defense interests was stressed in the consideration of all subsequent proposals.

The very nature and function of the properties rendered it inadvisable to lease them for private operation. Constant experimentation was considered necessary in order to prevent the deterioration and obsolescence of the Muscle Shoals properties. (See letter of Mr. Arthur Glasgow to Secretary of War Baker, *supra,* set forth in Report of Muscle Shoals Inquiry, H. R. Doc. No. 119, 69th Cong., 1st Sess. 18; War Dept. Rep. No. 2041 (1922), pp. 288, 289; 59 Cong. Rec. 4782.) The fact that, since the close of the War, science had discovered more

economic methods for the production of nitrogen served to emphasize the need for employing the properties in continuous research to preserve the existing investment (65 Cong. Rec. 4536, 4537). Provision in private offers with respect to research and experiment was always inadequate and often entirely lacking. (See, e. g., H. R. Rep. No. 980, 69th Cong., 1st Sess. 6). The responsibility for such functions was thought to devolve on Congress. (See Sen. Rep. No. 19, 71st Cong., 1st Sess. 6, 7; 67 Cong. Rec. 5203; 68 Cong. Rec. 4536, 4537; H. R. Rep. No. 143, 68th Cong., 1st Sess. 15, 17; Sen. Rep. No. 678, 66th Cong., 1st Sess. 3.)

The power of Congress to authorize experiments in the interest of the national defense (Section 5 (h)) and the manufacture of explosives (Section 5 (k)) in peace time can hardly be challenged. *Cf. M'Culloch* v. *Maryland,* 4 Wheat. 316; *Stewart* v. *Kahn,* 11 Wall. 493, 507; *United States* v. *Gettysburg Elec. Ry. Co.,* 160 U. S. 668. The administration of these provisions by the Authority, as shown on this Record, has already demonstrated that such activities are proper means for the maintenance of the Muscle Shoals properties. These operations are requiring the maintenance of a trained personnel of chemists, chemical engineers, and other technicians at Muscle Shoals, who in peace time are becoming skilled in the operation of the plant and form a nucleus for any emergency war organization (R. 898, 899, 926). The opera-

tions already under way have resulted in a substantial rehabilitation of the property at Nitrate Plant No. 2, and the continued operation will maintain the machinery in ready operating condition (R. 897). The present adaptation and operation of two of the electric furnaces at Nitrate Plant No. 2, to manufacture phosphoric acid, makes readily available a substantial quantity of white phosphorus, valuable for protection and for offensive purposes, and constitutes a substantial national defense asset (Fdgs. 46, 47, R. 1048; R. 918, 936, 939). The activities of the Authority have so far been limited to the experimental stage. Whether the Congress may lawfully authorize the operation of Muscle Shoals properties to their full capacity to manufacture and sell materials valuable for war and fertilizer uses (Section 5 (d)) need not therefore be considered here.

This peace-time maintenance of the Muscle Shoals properties is incompatible with the leasing of the surplus plant capacity at Wilson Dam. The Muscle Shoals properties were built as a unit and must be maintained under one management. The policy of operating the Muscle Shoals properties as a unit was strongly recommended by various committees which considered the Muscle Shoals problem as early as 1922. (See Report of Subcommittee of House Committee on Military Affairs, set forth in H. R. Rep. No. 1430, Part 2, 71st Cong., 2d Sess. 4; Report of Muscle Shoals Inquiry, H. R. Doc. No. 119, 69th Cong., 1st Sess. 3; H. R. Rep.

No. 2303, 69th Cong., 2d Sess. 2.) This view was forcibly expressed by Representative McSwain, now Chairman of the House Committee on Military Affairs:

> The plant was built as a unit; its arrangement, its service systems, such as water and sewage, railroad tracks, and lighting wires, all contemplate one management, and to divide the same up into two or more parts will lead to confusion, collision, and consequent failure for at least some of the lessees. It is too much to expect of human nature that there should be cooperation and joint action among two or more lessees upon the same ground, dealing with the same property, and, especially, receiving power from the same source (H. R. Rep. No. 1430, Part 2, 71st Cong., 2d Sess. 2).

The means of disposition of surplus power at Wilson Dam differs from that at Boulder Dam only in the fact that at the latter the Government employs an independent contractor to perform agreements by the Government for the sale of energy. The necessity of maintaining the Muscle Shoals properties under government control for war purposes renders any such arrangement impracticable at Wilson Dam.[37] Under these circumstances the

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[37] Difficulties in divided control were anticipated even at Boulder Dam, as has already been pointed out. Secretary of Interior Work, in his report to the Chairman of the

sale of the power by a government agency would seem to be the only appropriate means of disposition.

C. UNDER THE PROPERTY CLAUSE THE FEDERAL GOVERNMENT MAY DISPOSE OF THE WATER POWER NECESSARILY CREATED BY WILSON DAM AND MAY AUTHORIZE GENERATION OF ELECTRIC ENERGY AND ACQUISITION OF TRANSMISSION LINES AS A MEANS OF DISPOSAL

It is the position of the Authority, as already discussed, that the disposition of the power at Wilson Dam by the means authorized by the Act is an appropriate exercise of the Commerce and War Powers of the Constitution. It is to be noted also that the water power incidentally created at Wilson Dam is property *sui generis*. We submit that these means of disposition are also authorized by the Property Clause of the Constitution, Article IV, Sec. 3, clause 2:

> The Congress shall have power to dispose of and make all needful rules and regulations

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House Committee on Irrigation and Reclamation with respect to the Boulder Canyon project, observed:

"The building of a unified power plant by the Federal Government in the place of allocating power privilege, as proposed in the bill, is regarded as more efficient and cheaper. It will obviate controversies between applicants, and long delays in their adjustment. In the end, results will, I believe, be superior to those possible to an allocation of privileges" (H. R. Rep. No. 918, 70th Cong., 1st Sess. 26).

While the Boulder Dam power plant has, in fact, been leased to two separate lessees, the plant was, of course, designed for that method of operation.

respecting the territory or other property belonging to the United States.[38]

As the Circuit Court of Appeals observed, "unlike most other forms of property it [water power] cannot be put away and kept for future use or sale, but it must be either converted into electricity and used up as it is released from storage or allowed to go to waste" (R. 1309). Wilson Dam, however, like most navigation dams, is remote from the market for power. The Alabama Power Company is and always has been the only purchaser and, with its affiliate, the only party capable of purchasing power at the dam (Def. Ex. 98, R. 962; R. 962–964, 1023). In order to avoid waste or monopoly of the Wilson Dam power, to make a wide-spread

[38] The scope of this clause is described by Story on the Constitution (5TH ed.) Sec. 1325, p. 204, as follows:
"The power is not confined to the territory of the United States, but extends to 'other property belonging to the United States'; so that it may be applied to the due regulation of all other personal and real property rightfully belonging to the United States. And so it has been constantly understood and acted upon." See also *United States* v. *Nicoll*, Fed. Cas. No. 15,879, at 149 (C. C. D. N. Y.); 34 Ops. Atty. Gen. at 320, 322, 330.

The *Dred Scott* decision, 19 How. 393, cited by petitioners, did not make any distinction between real and personal property. The majority of the Court was of the opinion that the Property Clause was confined to property which belonged to the United States at the time the Constitution was adopted and did not apply to property subsequently acquired by the National Government. In this respect the decision has been consistently disregarded by the later decisions of this Court. See *Downes* v. *Bidwell*, 182 U. S. 244, 272–275. See also *Dorr* v. *United States*, 195 U. S. 138, 139, 140.

distribution of its benefits, the water power must be converted into electricity capable of minute subdivision and the energy transmitted to the market. The Tennessee Valley Authority Act authorizes the board to sell all surplus power to various classes of purchasers including governmental agencies and non-profit organizations (Sections 5 (l), 10), and further confers the authority to acquire transmission lines "in order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power" (Section 12).

The *Green Bay* and other cases already discussed establish that the power created by the construction and maintenance of Wilson Dam belongs to the United States, in the same manner as other property incidentally acquired in the performance of lawful functions.[39] The water power at Wilson

[39] This principle was succinctly stated in War Department Annual Reports, 1 Rep. Sec. War (1912) 32–35:

"It is also equally clear that inasmuch as the water power thus created is a by-product or incident to a general scheme of waterway improvement within the constitutional jurisdiction of the Federal Government the regulation and control of such water power lies also within that jurisdiction. That the Federal Government has the right to construct dams for the improvement of navigation, and a proprietary interest in the water power developed by these structures so built is settled beyond question. (*Green Bay & Miss. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58; 173 U. S. 179; 29 Ops. Atty. Gen. 173, 185.)"

Dam, like other property of the United States, is "held in trust for the people of the whole country." *United States* v. *Beebe,* 127 U. S. 338; *United States* v. *Trinidad Coal Co.,* 137 U. S. 160; *Camfield* v. *United States,* 167 U. S. 518; *Causey* v. *United States,* 240 U. S. 399.

The means and mode of administration and disposal rest in the judgment of Congress. "* * * how that trust shall be administered * * * is for Congress to determine." *Light* v. *United States,* 220 U. S. 523, 537; *Ruddy* v. *Rossi,* 248 U. S. 104. "The disposal must be left to the discretion of Congress." *United States* v. *Gratiot,* 14 Pet. 526, 537.

The administration of this trust in the interest of the conservation and the widespread utilization of public properties has been repeatedly sustained. This Court has observed that the Congress has the power and, indeed, is "charged with the duty" to protect its property from trespass and other interference. *United States* v. *Beebe, supra; McKelvey* v. *United States,* 260 U. S. 353; *United States* v. *Alford,* 274 U. S. 264. But the Government is not confined to the prevention of physical damage. It is equally clothed with the power and charged with the duty to protect its property against monopoly and waste. *United States* v. *Trinidad Coal Co., supra; Camfield* v. *United States, supra; Kansas* v. *Colorado,* 206 U. S. 46, 92; *United States* v. *Munday,* 222 U. S. 175, 181; *United States* v.

Shyrock, 162 Fed. 790, 793 (C. C. S. D. Ohio); *United States* v. *Hanson,* 167 Fed. 881 (C. C. A. 9th). The power of Congress to adopt all reasonable means of disposition in order to make a wide-spread distribution of the benefits of government property, to enact regulations and to undertake extensive affirmative projects as well, has been uniformly sustained by this Court. *United States* v. *Gratiot, supra; Camfield* v. *United States, supra; Kansas* v. *Colorado, loc. cit. supra; Ruddy* v. *Rossi, supra; Burley* v. *United States,* 179 Fed. 1 (C. C. A. 9th).

The practice of distributing the public lands in large tracts through private agencies, common at an early date, was gradually abandoned.[40] The Homestead Act of 1862 (12 Stat. 392) definitely established the congressional practice of distributing the public lands in *small tracts* to individual settlers, inaugurated in the Preemption Act (5 Stat. 453, 455) as early as 1841. In order to promote this policy of wide-spread distribution of the public property, Congress has provided exemp-

[40] See Hibbard, *History of Public Land Policies,* pp. 43–53. Protest against the sale of public lands in large lots was early voiced in Congress (*id.* at 61), and resulted in the gradual reduction of the minimum-sized tract offered for sale. In 1796, public lands were offered for sale in tracts of a section and one-quarter township (1 Stat. 464); in 1800, in tracts of sections of one-half sections (2 Stat. 73); in 1804, the minimum-size tract was reduced to a one-quarter section (2 Stat. 277, 281); and in 1820, to a one-eighth section (3 Stat. 566).

tion from assessment for indebtedness, continuing even after the lands have been included within a state (*Ruddy* v. *Rossi, supra*), and has forbidden the erection of fences on private lands enclosing public lands to the exclusion of intending settlers (*Camfield* v. *United States, supra*). In the *Camfield* case, this Court, in language which has obvious application to the case at bar, declared (167 U. S. at 524):

> * * * it [Congress] would be recreant to its duties as trustee of the people of the United States to permit any individual or private corporation to monopolize them [public lands] for private gain.

A similar practice has been observed with respect to other natural resources owned by the United States. From the beginning of our government, the Congress has reserved valuable mineral lands from ordinary grants. *Morton* v. *Nebaska,* 21 Wall. 660; *United States* v. *Sweet,* 245 U. S. 563. In making specific disposition of mineral and timber lands, Congress has strictly limited the area open to entry by any one individual or association (13 Stat. 529; 16 Stat. 217; 17 Stat. 91; *id.* at 607; 29 Stat. 526). The purpose of these restrictions, as this Court has observed, "was, manifestly, to prevent monopolies." *United States* v. *Trinidad Coal Co.,* 137 U. S. 160, 169; *United States* v. *Munday,* 222 U. S. 175, 181. In some instances the Congress has provided additional safeguards against monopoly to assure broad disposition of its properties by authorizing provisions in leases

fixing the resale price of the products and other terms of sale by the lessee.[41] In other instances Congress has promoted the same policy by requir-

[41] The fixing of resale prices was employed a century ago in connection with the leasing of mineral lands owned by the United States within the borders of a state. Such provisions were attacked in the lower court in the case of *United States v. Gratiot*, Fed. Case No. 15,249, and were upheld by Mr. Justice McLean (acting as Circuit Justice). The opinion states:

"* * * The limitation imposed on the price of the manufactured article is a very proper regulation in the lease; as it prevents monopolies, and other consequences injurious to the public, by a combination of the lessees. The argument is not sustainable, that if the United States may do this, they may engage in any other traffic, within a state, and regulate prices at pleasure. This consequence does by no means follow.

"The government has a right * * * to stipulate with the lessee, as one of the conditions of his lease, that he shall sell the ore he digs, or the lead he manufactures, at a fixed price. I can see no possible objection to such a regulation. It is one that any individual, on leasing a farm, may make * * * Such a contract, being voluntary, is binding; and so is the contract in question. For many years the government rented salt springs in Illinois, Ohio, and perhaps in other states; and it is believed to have been the practice to fix in these leases the price at which the salt should be sold. Such a provision instead of aiming to monopolize, is calculated to guard against a monopoly. Its effects instead of being injurious must be beneficial to the community. But, however this may be, it is clear to my mind, that such a regulation in no respect interferes with the sovereignty of the state, or any local law which the state has power to pass."

The lease was upheld by this Court, but the question certified did not embrace the validity of the resale price provisions (14 Pet. 526).

Similar provisions have been authorized more recently in connection with the lease of mineral lands (40 Stat. 300; 41 Stat. 449).

ing competitive bidding where the Government seeks to dispose of its property (41 Stat. 422, 437).

With the beginning of the conservation movement at the turn of the nineteenth century these principles were applied with renewed vigor. Far-reaching measures were taken by the Congress and the executive branch of the Government alike to prevent wasteful exploitation of the Government's resources, to assure widespread utilization of public property, and to obtain a fair monetary return to the Government. The Reclamation Act of 1902 (32 Stat. 388) was enacted to promote the settlement of the arid west. Millions of acres of forest and mineral lands were withdrawn from entry. The forest lands were permanently reserved; a system of leasing the coal and oil lands was substituted for the former method of outright disposition, the area subject to lease by any individual or association being strictly limited in amount (41 Stat. 437). In order to prevent waste of oil by drainage, the Congress has authorized the Secretary of the Navy to drill off-set wells and to sell the products (41 Stat. 812, 813; *Pan American Co.* v. *United States*, 273 U. S. 456, 501; *United States* v. *Belridge Oil Co.*, 13 F. (2d) 562, 564 (C. C. A. 9th)). This Court has sustained these measures in every instance in which they have been attacked.

The Reclamation Act of 1902 is the most significant illustration of the means which the Congress may employ to avoid the waste and promote the wide-spread utilization of public properties. The

effort to extend the policy of the Homestead Act to the arid lands of the west (18 Stat. 497; 19 Stat. 377) was early threatened with failure by reason of the inability of individual settlers to provide the necessary irrigation works. To facilitate the disposition of the arid public lands in small tracts, the Congress enacted the Reclamation Act of 1902 (32 Stat. 388), authorizing extensive reclamation projects to render its property "marketable" and habitable. *United States* v. *Hanson,* 167 Fed. 881 (C. C. A. 9th). Although the opponents of the measure confidently asserted that the measure was invalid,[42] the constitutionality of the Reclamation Act is not open to question. *Kansas* v. *Colorado,* 206 U. S. 46, 92; *United States* v. *Hanson, supra; Burley* v. *United States,* 179 Fed. 1 (C. C. A. 9th). The Reclamation Act was expressly approved in *Kansas* v. *Colorado, loc. cit., supra,* in the following terms:

> As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property.

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[42] The minority report on the Reclamation Act declared:

"The United States is not a dealer in real estate and has not the constitutional power to become such; it is not a real estate improvement society and has not the constitutional power to become such. The objects and purposes mentioned are not governmental objects or purposes" (H. R. Rep. 794, Part 2, 57th Cong., 1st Sess. 10).

These contentions are strikingly similar to those of the petitioners in this case, even in the matter of phraseology.

In the *Hanson* case, the Court observed:

> In pursuance of that power [the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States] Congress passed the Reclamation Act to make marketable and habitable large areas of desert land within the public domain, which lands are valueless and uninhabitable unless reclaimed by irrigation, and the *irrigation whereof is impracticable except upon expenditure of large sums of money in the construction of a system of reservoirs and distributing canals.* All previous efforts of the Government to make these arid lands available for settlement had resulted in failure. * * * These efforts having failed to accomplish the desired end, the reclamation act was passed. Congress, being the owner of the lands and vested with unlimited authority over the same, as it has been held by numerous decisions of the Supreme Court, had unquestionably the right to expend money thereon for their improvement (pp. 883–884). (Italics supplied.)

This Court has recognized that "the Government incurs heavy liability in providing water for these lands." *Irwin* v. *Wright,* 258 U. S. 219, 231. The capital for these great projects could have been supplied by private enterprise if the Government had been willing "to abandon our time-honored policy of inviting and encouraging small individual land holdings" and to turn over the public lands to private interests in sufficiently large tracts to

render private projects economically feasible. But "no one contemplated so stupendous a price as this for irrigation development." [43] The Reclamation Act in this view represents a choice of means, the refusal of Congress to resort to private agencies (a practice which had long been abandoned), a determination that the Federal Government must undertake these projects in order to insure the success of its long-established policy.[44]

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[43] The majority report accompanying the Reclamation Act declared:

"If we were willing to abandon our time-honored policy of inviting and encouraging small individual land holdings and were prepared to turn over all of the public lands under a large irrigation system to the control of a single individual or a corporation, we could undoubtedly secure the construction of extensive works which cannot be profitably constructed by private enterprise under present conditions, but no one contemplated paying so stupendous a price as this for irrigation development.

* * * * *

"The bill is carefully guarded against the accumulation of large holdings of irrigated lands in single ownership and would compel the breaking up of any large tracts now held for which water rights from Government works are to be obtained by limiting the area of lands the property of any one land-holder for which a water right may be acquired to one hundred sixty acres" (H. R. Rep. No. 794, Part. 1, 57th Cong., 1st Sess. 3, 7).

[44] The activities of the Federal Government at Hot Springs National Park furnished an interesting, though limited, precedent. For more than fifty years the mineral waters at Hot Springs National Park, forever reserved from sale or alienation, have been collected in reservoirs constructed by the Government, and piped to purchasers within and without the park. See *Van Lear* v. *Eisele*, 126 Fed. 823 (C. C. E. D. Ark.); 16 U. S. C. A. Secs. 361–364.

The measures for the conservation of other national resources have similarly been approved. The contention that the Government was without power to reserve forest lands from entry was rejected in *Light* v. *United States,* 220 U. S. 523. Any suggestion that the Congress could not permanently reserve mineral lands and dispose of their products by lease was foreclosed by an early decision of this Court. *United States* v. *Gratiot,* 14 Pet. 526.

These principles and precedents are clearly applicable to the generation and transmission of surplus power at Wilson Dam. Since the completion of the dam, the Congress has thoroughly considered the choice of means to make possible the widest distribution of the surplus power at Wilson Dam. The Congress refused to permit Mr. Ford, the American Cyanamid Company or any other single individual or corporation to use the surplus power for its own private benefit. As early as 1926 the Congress resolved that the surplus power must be "equitably distributed" among the states within transmission distance of the dam, and this policy was expressly written into Section 11 of the present Act. In this Act, as in the Reclamation Act of 1902, the Congress determined that its policy could not be served by disposing of the property to a limited group. It chose instead to establish a government agency with authority to sell the surplus power and to acquire transmission lines.

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Such means of disposition are surely no less reasonable than the construction and operation of dams, reservoirs, and canals, and the appropriation of waters under state laws to make marketable the arid public lands. In order to make possible a widespread distribution, the Wilson Dam power must be converted into electric energy capable of minute subdivisions, and transmitted to the market. This is the common method of disposal of water power, and has numerous precedents in federal practice (*infra* at 137). As early as 1912 the Congress authorized the Secretary of War to make provision for the future generation of electricity at all navigation dams whenever appropriate. (37 Stat. 201, 233). In 1928 the Congress directed the construction of a power plant at Boulder Dam, the title to which was forever to remain in the Government (45 Stat. 1057, Section 6), and required as a condition of the sale of any large block of energy that the purchaser provide transmission facilities for allottees of lesser amounts of energy (Section 5 (d)). Since 1906, the Secretary of the Interior, pursuant to congressional authorization, has operated generating facilities and transmission lines to dispose of surplus power incidentally created at reclamation dams (*infra* at 138). These means of disposition of water power are particularly appropriate at Wilson Dam where the Government has already constructed a power plant and is presently main-

taining the Muscle Shoals properties in the interest of national defense.

Cases like *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; and *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, relied upon by the petitioners, plainly do not support their contentions. These cases deal merely with the question of whether the activities involved there did or did not constitute "doing business" within the meaning of the tax statutes involved.

Utah Power & Light Co. v. *Pfost*, 286 U. S. 165, similarly is not in point. That generation, like mining or manufacturing, constitutes a local transaction for the purpose of state taxation need hardly occasion surprise. The Court, it is true, observed that the conversion of mechanical energy in the falling water into a different form of energy, electricity, preceded the transference of the energy to the purchaser (*id.* at 179). This is far from suggesting that the conversion of water power into electric energy is not a reasonable means of disposing of the energy in the falling waters. The practice of private industry, as is evidenced by the *Pfost* case itself, and that of the Federal Government, is sufficient evidence that the conversion of water power into electric energy is a reasonable means of disposing of the water power.

The petitioners' most earnest contention is that the Government's construction of the Property Clause of the Constitution is inconsistent with the

spirit of the Constitution. This contention is not novel. It has been made whenever the Government has sought to conserve its natural resources in the public interest. The leasing of public mineral lands was challenged a hundred years ago on the ground that it would place the Federal Government in a continuing business and create a federal "tenantry" within the states. *United States* v. *Gratiot,* 14 Pet. 526. The reservation of large tracts of the public domain for the conservation of forests was attacked as being in derogation of the sovereignty of the states and inconsistent with the purposes for which the lands were entrusted to Congress. *Light* v. *United States,* 220 U. S. 523. The opponents of the Reclamation Act declared that "the United States is not a dealer in real estate * * * [or] a real estate improvement society, and has not the constitutional power to become such." See *supra* at 130, note 42. Indeed, the very contention of the petitioners in this case has a parallel in the claim of the private riparian owner to all of the power created by the dam involved. *Kaukauna Water Power Co.* v. *Green Bay & Miss. Canal Co.,* 142 U. S. 254. This Court rejected that contention, declaring that the power produced by the expenditure of public funds "should belong to the public and be used for their benefit and not for the emolument of a private proprietor" (*id.* at 281, 282). The contention of petitioners that, in the disposition of the surplus energy at Wilson Dam, the Congress in effect is limited

by the Constitution to dealings with the Alabama Power Company should receive the same answer.

D. THE ACTIVITY IN QUESTION IS IN ACCORD WITH GOVERNMENTAL PRACTICE OF LONG STANDING

As Marshall observed in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 401, "This can scarcely be considered an open question, entirely unprejudiced by the former proceedings of the nation respecting it." For almost fifty years the Congress has made provision for the disposition of power incidentally created by the construction and maintenance of federal water developments. For almost thirty years provision has been made for the conversion of the incidental water power into electricity and the sale of such energy. During this period the power of the Congress to dispose of the water power or electricity created at federal water developments was thoroughly explored by the Congress and the Executive Departments and upheld by the ablest lawyers of the Government.

Perhaps the most interesting precedents in federal practice are the activities of the Bureau of Reclamation and the disposition of surplus power at federal irrigation projects. Section 5 of the Act of April 16, 1906 (34 Stat. 117), authorized the Secretary of the Interior to lease for a period not exceeding ten years any surplus power incidentally created in a reclamation project, giving preference to municipal purposes. Twenty-two power plants

have been constructed at federal reclamation projects. (See Annual Report of the Commr. of Reclamation (1932) 15; *The Reclamation Era,* May 1932, p. 91.) In 1932, nine of these power plants, having an installed capacity of 31,500 kw. were operated by the Bureau of Reclamation. (See Annual Report of the Commr. of Reclamation (1932) 15.) Most of the plants were originally constructed for irrigation and other project purposes. The Bureau has, however, constructed the Guernsey plant on the North Platte project and has added capacity at others "for the profit which would result from building power plants." (See *id.* at 12–14.)

The Bureau sells power to towns, villages, and, in some instances, rural customers, as well as to power companies. (See *id.,* Reclamation Tables 19 and 20, set forth in Appendix J, pp. 101–103; *The Reclamation Era,* April 1925, p. 37; *id.,* May 1932, p. 91.) All energy not needed for project purposes is treated as surplus for purpose of sale. In 1932, the Bureau sold about 64,000,000 kwh., one-half of the total energy generated at the Bureau's plants, earning a revenue of $400,000. (See Annual Report of the Commr. of Reclamation (1932) 15, Reclamation Table 19, Appendix J, p. 101.) At the several plants operated by the Bureau, all or substantially all of the power has been sold to commercial customers. This is true at the North Platte, Riverton, Shoshone, and Yuma projects. (See *id.,* Reclama-

tion Table 19.) The power is sold on a firm power basis, the contracts providing for a minimum monthly payment. (See *id.*, Reclamation Table 20.) The Bureau maintains transmission as well as generating facilities.[45] Up to 1932, 3,308 miles of transmission lines were constructed by the Bureau, some of which were used both for project purposes and the sale of surplus power. (See *id.* at 5.)

The Bureau's practice is well illustrated by the power operations at the North Platte project. Practically all of the power produced is sold commercially. This project includes about one hundred and forty miles of transmission lines, almost all of which were constructed solely to serve commercial customers. The project serves twenty-seven cities and villages, a wide rural territory, irrigation and drainage pumping plants, and various mines, quarries, sugar factories, and other industrial customers. (See *The Reclamation Era,* November 1926, p. 196; Reclamation Table 20, Appendix J; Bureau of Reclamation Report entitled "Power Development on the North Platte Project", prepared by H. F. McPhail, August 20, 1926.) Congressional recognition and approval of the Bu-

[45] As early as 1913, the Attorney General had occasion to consider and approve a contract executed by the Secretary of the Interior for the delivery of electric energy generated at the Salt River project at the City of Phoenix, Arizona (30 Ops. Atty. Gen. 197(.

reau's practice is contained in numerous appropriation acts appropriating the revenues of the power plant for the maintenance and operation of "the commercial system." [46]

A similar practice has been followed with respect to the power produced as a by-product of federal navigation developments. As early as 1888 Congress authorized the Secretary of War to lease the surplus power at federal dams on the Muskingum River (25 Stat. 400, 417), and has since frequently made similar provision for the disposition of the surplus power available at other navigation improvements (see, e. g., 26 Stat. 426, 447; 32 Stat. 408, 409; 35 Stat. 815, 821, 822; 36 Stat. 630, 668-669). In recognition of the scientific progress in the method of disposition of water power, the Congress in 1912 authorized the Secretary of War to make provision for the future generation of electric energy in construction of all navigation dams (37 Stat. 201, 233).

The provisions of the Boulder Canyon Project Act of 1928 (45 Stat. 1057) are particularly significant. The Act provided for the construction of a hydroelectric power plant, title to which was to remain forever in the Government. In order to assure a " sound competitive condition " and prevent the power from being " monopolized ", the

[46] See 45 Stat. 228, 230, 1590, 1591, 1592; 46 Stat. 1569; 47 Stat. 115, 116, 843, 1609; 48 Stat. 380, 381.

Act provided for the sale of electric energy to all classes of purchasers, preference being given to states and municipalities. (See H. R. Rep. No. 918, 70th Cong., 1st Sess. 22; Sen. Rep. No. 592, 70th Cong., 1st Sess. 26–27.) Although electric energy was to be sold at the switchboard, effort was made to facilitate the wide-spread distribution of the power by requiring that any purchaser receiving a contract for a large block of power could be required to provide transmission facilities for purchasers of smaller amounts. The sponsors of this measure found nothing novel in these provisions. Secretary of Interior Work, in his report on the bill, observed:

> This plan of power development is not an experiment. It has been adopted by the Government with satisfactory results in the construction of other reclamation works where generation of power is an incident to irrigation development (H. R. Rep. No. 918, 70th Cong., 1st Sess. 27).

This practice "did not steal upon an unsuspecting legislature, and pass unobserved" (*M'Culloch* v. *Maryland*, 4 Wheat. 316, 402). The question of constitutional power has been carefully explored both by the legislative and the executive branches of the Government, particularly during the administration of Presidents Roosevelt, Taft, and Wilson. The issue was presented by the various proposals to license private hydroelectric developments which

culminated in the Federal Water Power Act of 1920 (41 Stat. 1063). While there was sharp difference of opinion as to whether the Congress could lawfully license such private developments, there was quite general agreement that where the Government itself constructed a dam for the lawful purpose of navigation, it could dispose of the power produced as a by-product.

The ablest legal advisers of the Roosevelt, Taft, and Wilson administrations all advised that the right of the Federal Government to dispose of such power was clear. The authority was assumed to exist by the Attorney General in 1911 (29 Ops. Atty. Gen. 173, 185). President Taft declared that the authority to dispose of power "incidentally created by the dam" was "beyond question" (Sen. Doc. No. 949, 62d Cong., 2d Sess., set forth in Hearings before House Committee on Military Affairs, 74th Cong., 1st Sess. 15). The Secretary of War in 1912 took the same position (War Department Annual Report, 1 Rep. Sec. War (1912) 32). This view was shared by the National Waterways Commission, of which Senator Burton was chairman, created by act of Congress of March 3, 1909 (see Final Report of National Waterways Comm., Sen. Doc. No. 469, 62d Cong., 2d Sess. 50–51), and the Subcommittee of the Senate Judiciary Committee in 1915 (Sen. Doc. No. 246, 64th Cong., 1st Sess. 17).[47]

[47] The report was prepared by Senator Nelson, Chairman, and Senators Root and Chilton.

This opinion was expressed by the foremost constitutional lawyers in the Congress (49 Cong. Rec. 3055 *et seq;* 53 Cong. Rec. 2651–2652).[48]

We set forth these opinions here only to show that the right of the Government to dispose of power created by the construction of a lawful navigation dam was quite generally assumed. The precise means of disposition, it is true, were not discussed.[49]

The established practice and constitutional interpretation are no better exemplified than in Section 124 of the National Defense Act and in the operation of Wilson Dam. At the time of its passage even the opponents of this section readily conceded the power of the Government to dispose of the surplus energy at Wilson Dam during peace time (53 Cong. Rec. 5959–5961). At the close of the War, the Secretary of War strongly endorsed the Wadsworth Bill, which, as has already been observed, provided for the sale of electric energy at Wilson Dam. Indeed, in 1924 he recommended the passage of a bill (H. R. 518, 68th Cong., 1st Sess., as reported with amendments by the Senate Committee on Agriculture and Forestry) which

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[48] Petitioners rely extensively on a volume entitled "Congressional Debates on Federal Electric Power Operations and Related Questions", published by Bolling R. Powell, Jr., an attorney of Birmingham, Alabama, in September 1935. Comparison with the debates reveals substantial omissions of pertinent matter.

[49] See Hearings before House Committee on Military Affairs, 74th Cong., 1st Sess. (1935), 198–199.

provided for the generation and transmission of electric energy by a government agency.[50] Since the construction of Wilson Dam, the Government has continuously sold the surplus electric energy to the Alabama Power Company. Its right to do so was never seriously questioned [51] until the Congress made provision to permit others to share the benefits of this great government investment.

IV

THERE IS NO MERIT IN THE CONTENTIONS OF PETITIONERS THAT THE ACTIVITIES OF THE TENNESSEE VALLEY AUTHORITY INVOLVED IN THIS SUIT ARE "INTRINSICALLY ALIEN TO FEDERAL FUNCTION" AND CONSTITUTE AN INVASION OF STATE SOVEREIGNTY

A. THE FACT THAT THE ACTIVITIES OF THE AUTHORITY MAY BE DESCRIBED AS COMMERCIAL OR PROPRIETARY IS OF NO CONSTITUTIONAL SIGNIFICANCE

The claim that the activities of the Authority are "essentially commercial and proprietary" (*cf.* petitioners' brief, pp. 107, 83–84) is of no constitutional significance. That the Constitution confers

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[50] See Hearings before the Senate Committee on Agriculture and Forestry, 68th Cong., 1st Sess. (1924), 330, 332–333.

[51] The State of Alabama at one time claimed a right to tax the generation and sale of power at Wilson Dam. *Alabama* v. *United States*, 38 F. (2d) 897 (Ct. Cl.), *dismissed for want of jurisdiction*, 282 U. S. 502. The state also at one time claimed an equitable share in the proceeds. See Sen. Doc. No. 31, 70th Cong., 1st Sess. (1928) 31.

upon the National Government no independent grant to engage in business generally, all will admit. But that the powers conferred upon that Government necessarily end where commercial and proprietary functions begin cannot be maintained. Such a limitation of "means" would, as a practical matter, greatly impair and inhibit the federal power to perform conceded constitutional functions in an effective, efficient, and economic manner. Concerning a similarly suggested limitation in *M'Culloch* v. *Maryland,* 4 Wheat. 316, Chief Justice Marshall said:

> But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in a manner most beneficial to the people (p. 421).

The mere fact that one of the incidental results is governmental activity in a field more commonly occupied by private corporations is not a reason for denying the existence of the power; *a fortiori* when the field is frequently occupied by other public agencies. "The conduct of business in competition with private interests may, of course, be for a public purpose. *Standard Oil Co.* v. *City of Lincoln,* 114 Neb. 243, 207 N. W. 172, *aff'd* 275 U. S. 504." (*Emergency Fleet Corporation* v. *Western Union,* 275 U. S. 415, 424–425.)

Examples of governmental activity which in their commercial aspect are similar to those now challenged are numerous and familiar. Among these, in addition to the establishment of banks (*M'Culloch* v. *Maryland, supra; First National Bank* v. *Fellows,* 244 U. S. 416; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180), are the leasing of lead mines on the public lands (*United States* v. *Gratiot,* 14 Pet. 526); the ownership and operation of merchant ships (*King County* v. *United States Shipping Board Emergency Fleet Corp.,* 281 Fed. 950 (C. C. A. 9th); *Sloan Shipyards* v. *United States,* 272 Fed. 132 (D. C. W. D. Wash.); *cf. Emergency Fleet Corporation* v. *Western Union, supra*); the establishment of a federal housing corporation (*New Brunswick* v. *United States,* 276 U. S. 547); the establishment and operation of the Panama Railroad (*Wilson* v. *Shaw,* 204 U. S. 24); the establishment of the parcel post in competition with private express companies (37 Stat. 567); and the postal savings system in competition with banks (36 Stat. 815).

The extent to which the Federal Government may engage in so-called commercial operations in the performance of its lawful functions is nowhere better illustrated than in federal water developments. The parallel development of navigation and reclamation projects by the Federal Government is itself a conclusive answer to petitioners' contention. The construction and operation of naviga-

tion improvements, bridges, and roads by private enterprises was common in our early history (see *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312) and is not unknown today. The right of the Federal Government to construct and operate such instrumentalities of interstate commerce has been upheld by the decisions of this Court. See, e. g., *United States* v. *Jones,* 109 U. S. 513; *Luxton* v. *North River Bridge Co.,* 153 U. S. 557. The disposition of the by-product power by the United States has been a recognized incident in both reclamation and navigation projects.

B. THE CONTRACTS AUTHORIZED BY THE ACT DO NOT IMPOSE ANY "SERVITUDE" UPON THE UNITED STATES IN VIOLATION OF THE CONSTITUTION

The petitioners attack the Act on the ground that in authorizing the Authority to enter into contracts for a period of twenty or thirty years, it creates a "perpetual or long-term commercial servitude", which constitutes an abdication of the legislative powers of Congress (brief, pp. 166 *et seq.,* 234–235). It is argued that these relatively long-term commitments are in violation of the Constitution. The short answer to this contention is that if Congress had chosen to lease its properties, as the petitioners maintain should have been done (brief, pp. 104, 117), the same result would have followed. With respect to the continuing functions of Congress, there can be no difference in the two situations. In-

deed, the Boulder Canyon Project Act authorized the execution by the Secretary of the Interior of fifty-year contracts for the lease of the power plant to generating agencies, and authorized, in addition, fifty-year contracts to be executed by the Secretary for the delivery of electric energy to so-called allottees.

These are not isolated instances in federal practice. Perhaps no enterprise is more characteristically continuing or long-term than the business of life insurance. Yet the United States, under the War Risk Insurance Act, has undertaken to issue policies of the usual commercial types, including twenty- and thirty-payment life insurance, and twenty- and thirty-year endowment policies. In 1934, 598,226 of these policies in the aggregate were outstanding, representing a total obligation on the part of the United States of $2,666,733,150. (See Annual Report of Veterans' Administration, 1934, p. 39.) These policies have been made available to all persons in the military and naval service and are obviously in competition with the business of private insurance companies. See *Lynch* v. *United States,* 292 U. S. 571. The cases cited by petitioners relate not to governmental contracts, but to private contracts. *Cf. Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467; *Norman* v. *Baltimore & Ohio R. R.,* 294 U. S. 240 (brief, p. 170).

The making of relatively long-term contracts is a normal method of disposing of electric energy. The practice is common in the Reclamation Service.

The identical contention that a sovereign cannot bind itself by long-term commitments was made in objection to the practice of states and subdivisions thereof in conferring franchises upon utilities and in fixing rates for a substantial future period. The power of local governments in this regard is well established. As was said by this Court in *St. Cloud Public Service Company* v. *St. Cloud,* 265 U. S. 352, 355:

> It has been long settled that a state may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and that the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates. *Home Telephone Co.* v. *Los Angeles,* 211 U. S. 265, 273, 53 L. Ed. 176, 182, 29 Sup. Ct. Rep. 50, and cases there cited.

There is nothing in the Property Clause of the Constitution which limits the power of the Federal Government to undertake long-term obligations in connection with the disposal of property. The contracts of the Reclamation Service involve an exercise of this power. (See *United States* v. *Han-*

son, 167 Fed. 881.) A century ago the argument was made that in leasing public lands the United States was to that extent abdicating its sovereign power. This objection was disposed of in *United States* v. *Gratiot,* 14 Pet. 526. The suggestion of petitioners (brief, p. 187) that the *Gratiot* case rested on the fact that there was but a single lease and that had there been more numerous leases the decision would have been otherwise, finds no support in that case or in the practice which both antedated and has followed it.

C. AGREEMENTS BETWEEN MUNICIPALITIES AND THE AUTHORITY REGARDING RESALE RATES DO NOT DISPLACE OR INVADE THE REGULATORY POWERS OF THE STATE

The petitioners contend that the Tennessee Valley Authority is usurping or invading the power of Alabama to regulate public utilities operating within the state. The petitioners do not suggest that the Authority has attempted or intends to prescribe resale rates for the power secured by the Alabama Power Company under its interchange agreement. The contention is that in its contracts with certain municipalities the Authority is controlling the rates at which power furnished by it to those municipalities is sold to consumers; and that this constitutes an invasion of the regulatory power of Alabama. The contracts provide that the municipalities securing electricity from the Authority will agree that in selling that electricity

their rates will conform to those specified in the contract (R. 1204). It should be noted that the validity of the contract of January 4 can hardly be affected by the provisions of these contracts.

But there is another answer. These contracts, so far from constituting an interference with state law, are necessarily subservient to that law. The force and effect of the contracts depend upon the law of Alabama no less than if the municipalities had made the contracts with a private wholesaler. The essential question is not one of federal constitutional law. It is one of the authority of the municipalities, under state law, to contract not to charge more than certain rates agreed upon.

To that question the Supreme Court of Alabama has given an authoritative answer. Chapter 107 of the General Acts of Alabama, special session, 1933 (Appendix K, p. 105), which was enacted for the stated purpose of enabling cities to avail themselves of power from the United States at Wilson Dam, authorized the cities to purchase or construct electric plants, power lines, and distribution systems, and to borrow money therefor and provide for its repayment with interest. Section 4 of that act provides that no municipality operating an electric light plant "shall charge any rate for electricity supply and service that is higher than the rate for similar electric supply and service that has been authorized and approved by the Alabama Public Service Commission for public utility companies

operating in cities of approximately the same size in Alabama." In *Oppenheim* v. *City of Florence*, 229 Ala. 50, 155 So. 859, the Supreme Court of Alabama sustained the power of the city, under the statute noted above, "to put into effect its proposal to acquire and operate an electric distribution system, including the purchase of electricity from T. V. A. and its resale to the public." The court passed favorably in its opinion upon the contract between the City and the Tennessee Valley Authority. Objection was made that, contrary to the Alabama constitution, the state had surrendered its police power over rates charged by cities; but to that objection the court, pointing out that Section 4 of the statute imposed a specific limitation in respect to those rates, answered:

> Instead of granting an uncontrolled and irrevocable right to the cities, it unmistakably reserved its supervision inherent in its police power to pass upon the reasonable aspect of such rates. Within those limits cities have had thereby conferred upon them a reasonable latitude to exercise a discretion, but with the right of supervision reserved to the state (p. 57).

Indeed, the Alabama statute setting maximum rates was an extension of the state regulatory control over municipal systems, for previously they were wholly exempt from state legislation. (See Alabama Code of 1928, Sections 9741, 9742, 9743; *Culpepper* v. *Phenix City*, 216 Ala. 318; 113 So. 56.

And for a later statute on the same subject see Chapter 155, Alabama General Laws, 1935, Appendix K.) The fact that the municipalities choose to contract with an agency of the Federal Government is of no legal relevance here. The federal character of the agency raises no new question. It involves simply the authority of the Federal Government to contract for the sale of the energy; and that authority depends upon the constitutional powers which have already been discussed.

Petitioners suggest that apart from the provisions of the contracts, the mere disposal of power by the Government necessarily interferes with the state regulatory power (brief, pp. 34–37, 175–179).

The substance of petitioners' contention appears to be that unless the Alabama Power Company is free from any competition by a governmental agency the state's regulatory powers will be nullified. The legislative policy of the state furnishes a complete answer.

Alabama, as noted above, has long exempted municipalities and other governmental agencies from regulation by the State Public Service Commission. The legislative policy is thus seen to be one of encouraging utility service by state governmental agencies. It can hardly be contended that the state's regulatory power is affected when those agencies purchase their power wholesale from Wilson Dam rather than generating their own energy.

Any contracts between the Authority and state agencies for the sale of power are, of course, subject to all limitations respecting the right of the agencies to execute such agreements.

D. THERE IS NO PURPOSE IN THE ACT TO REGULATE MATTERS RESERVED TO THE STATES BY THE NINTH AND TENTH AMENDMENTS

The petitioners contend that even though the activities authorized by the Tennessee Valley Authority Act were otherwise constitutional they are rendered invalid by reason of an alleged purpose to regulate or control matters reserved by the Constitution to the states. (See brief, pp. 159–164.) Apparently petitioners do not challenge the purposes of Congress as disclosed in the Act. The principal contention appears to be that the press releases of the Tennessee Valley Authority, of other administrative branches of the Government, and the "flood of articles which have appeared in the periodical press with reference to the Tennessee Valley Authority program" are a part of the *"res gestae"* from which it appears that the "Tennessee Valley Authority program" is a "power program." (See brief, pp. 21–24, 163–164.) This novel contention requires no extended answer.

The purposes and policies of the Act, as stated on its face and as revealed in legislative history, negative any intention to accomplish objectives not en-

trusted to the Federal Government. Any contention that the stated purposes of the Act are a mere "subterfuge" is without foundation. Perhaps it is enough to say that this Court will not look beyond the stated purposes of the Act, *Arizona* v. *California,* 283 U. S. 423, and that nothing on the face of this Act discloses an intention to accomplish a purpose other than those stated. *Cf. Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20, and *Hammer* v. *Dagenhart,* 247 U. S. 251. The fact that certain members of Congress, and of the Administration, desired the Act to be adminstered in such a manner as to provide a measure of the costs of electricity, is of no legal significance. This Court has repeatedly held that the Federal Government may exercise its granted powers in accordance with such policy as it may deem in the interest of the nation.

But there is a more compelling answer. The legislative background of the Act clearly reveals that the stated purposes of the Act embody the true intention of Congress regarding both the construction of dams and the disposal of surplus power thereby created.

E. THERE IS NOTHING UNCONSTITUTIONAL ABOUT THE "YARDSTICK"

As above noted, certain members of Congress had urged that the Wilson Dam power should be sold by the government in such a manner as to provide a "yardstick" with which to measure the true

costs of electricity. Although this conception was not expressly incorporated in the statute as originally enacted, it was recently embodied in an amendment to Section 14 which simply provides for accumulating accurate cost data, maintaining a uniform system of accounting, and keeping such other records as may be helpful in determining the actual cost and value of services, etc. The Authority is required to report this information from time to time to Congress and also make it available to the Federal Power Commission and other federal and state agencies. The nature of the so-called "yardstick" is clearly defined by this section of the statute and has always been so understood. In its so-called "Power Policy" of Aug. 25, 1933 (R. 108–110), the Authority stated:

> 10. Accounting should show detail of costs, and permit a comparison of operations with privately owned plants, to supply a "yardstick" and an incentive to both private and public managers.
>
> 11. The accounts and records of the Authority as they pertain to power will always be open to inspection by the public.
>
> (R. 108, 110; *Cf.* R. 591; Annual Report of the Tennessee Valley Authority, fiscal year ending June 30, 1934, p. 24.)

The so-called "yardstick" is thus only a matter of accounting coupled with a wide-spread pub-

lication of the information obtained. The yardstick, whatever its influence on rates, does not have the effect of law. It is not expressed in terms of law. It does not purport to be law. It imposes no duty. It prescribes no penalty. Its function is educational, and at most advisory.

The case of *Standard Scale Co.* v. *Farrell,* 249 U. S. 571, furnishes a suggestive illustration and persuasive analogy. Under statutory authority the New York State Superintendent of Weights and Measures published a bulletin of specifications for automatic computing scales, and subordinate officers either refused to seal, or marked as faulty, scales not up to the specifications. As a result, plaintiff Scale Company suffered serious loss of business and sought injunctive relief on constitutional grounds. But this Court held that such activities on the part of a state did not even constitute state action within the meaning of the Fourteenth Amendment. The specifications, said the Court:

> * * * are a law only in the sense that every truth of general application may be spoken of as a law. If they may be termed a rule, it is only in the sense that they furnish a guide for the action of those interested; that is, the function of the "specifications" is educational and, at most, advisory.
>
> * * * But since the "specifications" are not in the nature of a law or regulation,

the prohibitions of the Federal Constitution cannot apply[52] (pp. 574–577).

F. NOTHING IN THE PUBLIC ANNOUNCEMENTS OF THE DIRECTORS RENDERS THE ACTIVITIES OF THE AUTHORITY INVALID

It cannot seriously be urged that the validity of the Act can in any way be affected by the motives of the directors expressed subsequent to its enactment. We think it equally clear that such motives cannot affect the statutory powers of the Authority. As the Circuit Court of Appeals observed below:

> It does not appear that T. V. A. in respect of its operations at Wilson Dam is doing or proposes to do anything more than is authorized by the Act. This being so, its motives are immaterial (R. 1309).

In any event, the policies of the Authority are wholly proper and in accord with the stated purposes of the Act.

The suggestion of the petitioners that the court found certain purposes named by the petitioners as dominant purposes or as "the primary objectives of the Tennessee Valley Authority program" (brief, p. 22) is inaccurate. In nine separate

[52] In *Pennsylvania Railroad Co.* v. *United States Railroad Labor Board*, 261 U. S. 72, it was held that no injunction will issue against the Labor Board in the performance of its statutory duty where there is "no constraint upon them [the parties involved] to do what the Board decides they should do except the moral constraint of publication of its decision."

paragraphs the District Court named objectives and purposes of the Authority but found that these purposes were "*among* the objects and purposes intended to be accomplished by T. V. A. in the *electricity* program" (Fdg. 70, 71, R. 1059–1061). (Italics supplied.)

The findings can have no relation to the purpose for which Wilson Dam was constructed and the now available power created. Moreover, they have nothing to do with the purpose of the Authority in constructing dams or with any other of its activities than the sale of surplus power. The findings heretofore noted as to the indispensable relationship of the dams now under construction to navigation and flood control negative any suggestion that the Authority is constructing these dams primarily for power. See *supra* at 23.

The findings of the District Court confirm the fact that in the distribution of power the Authority has endeavored to avoid the waste of water power, to promote the wide-spread distribution of its benefits, to liquidate the costs of the projects, and to give preference to governmental agencies and nonprofit organizations, all in accordance with the stated purposes of the Act. The finding of the District Court that it is a "function of the program * * * to encourage public ownership of utilities within the area" must be read in the light of the evidence that almost immediately after the enactment of this Act, the Authority received ap-

plications for power from twenty-five municipalities in the surrounding states (R. 585–586), several of whom had long been active prior to the passage of the Act in endeavoring to secure municipal distribution of electric power (Fdg. 171, R. 1089).

The advisory nature of the yardstick is confirmed by the fact, stressed by petitioners (brief, pp. 15, 22), that the Authority has included in its contracts with municipalities provisions respecting rates and accounting methods. These, of course, do not affect the contract of January 4. Moreover, the Authority and the municipalities have merely exercised their unquestioned statutory power to provide a completely representative example of a government operation.

The petitioners have attempted to convey the impression that the Authority is endeavoring not merely to provide a yardstick but to regulate public utilities by competition. To this effect, they quote an address by one of the directors of the Authority (brief, p. 21). But, when read in its context, this speech will not bear the construction which petitioners intend to convey. In the first place, it is plain that this speech was not intended to express all of the purposes of the Authority or even its primary objectives. The statement related solely to the relation of the Authority to business. Moreover, it is clear that the "competition" referred to was not competition in the ordinary commercial sense but only "competition in method" (69 Cong. Rec. 4329). As a demonstration, its only effect is through the persuasive force of example (R. 264).

In No. 404, the Courts Below Did Not Commit Reversible Error in Refusing to Grant a Declaratory Decree

Petitioners contend that both courts below erred in refusing to grant a declaratory decree on the validity of "proposed extensions of the competition" by the Authority (p. 6 of petition for writs of certiorari). We have already dealt in No. 403 with the alleged "competition" under the contract in suit (see supra at 57). The Authority's presently proposed activities in the territory of the Alabama Power Company are limited by the terms of this contract. In Case No. 404, petitioners seek a declaratory decree on possible future competition which may result upon the expiration of the contract.

Petitioners admit that their alleged right to sue to enjoin competition is a derivative one and can be asserted only where the corporation itself might sue (brief, pp. 231, 232). They invoke *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 515, in support of this alleged right. At the outset it should be noted that the *Frost* case does not support the maintenance of this suit by either the stockholders or the corporation. That case does

not hold that a corporation may question the validity of a federal statute because such statute results in competition with the corporation. Nor does it hold that a corporation may sue to enjoin that competition on the alleged ground that the activities of the competitor are unauthorized. The *Frost* case cannot be deemed to overrule other decisions of this Court holding that a corporation may not sue to enjoin competition on the alleged ground that the activities of the competitor are beyond its authority (see *Railroad* v. *Ellerman*, 105 U. S. 166; *cf. Corporation Commission of Oklahoma* v. *Lowe*, 281 U. S. 431). In the instant case, moreover, there is no direct competition by the Authority within the scope of the *Frost* case, since the municipalities will distribute the power.

The Federal Declaratory Judgments Act of June 14, 1934 (48 Stat. 955), provides that the courts "*shall have power*" to declare rights and other legal relations "in cases of actual controversy." Since the power is discretionary the denial of a declaratory decree by the courts below is sufficient reason for this Court to deny petitioners such a decree. But, in addition, the courts below would have committed error in granting the declaratory judgment requested because the facts did not present a justiciable controversy.

What plans the Alabama Power Company and the Authority may make upon the expiration of the contract of January 4, 1934, are clearly uncertain, contingent and hypothetical, particularly in so far

as they may be affected by dams which are still in the construction stage. In the words of the petitioners, the relief sought is from a "plan potential on the record" (brief, p. 73). The decree sought by petitioners could therefore only be advisory.

This Court has held that a complaint based upon potential or contingent acts, or upon "assumed potential invasions", does not present a "controversy within the range of the judicial power." (See *New Jersey* v. *Sargent*, 269 U. S. 328, 339–340; *New York* v. *Illinois*, 274 U. S. 488; *Arizona* v. *California*, 283 U. S. 423, 462–464; *United States* v. *West Virginia*, 55 Sup. Ct. 780.) The Declaratory Judgments Act does not modify the requirements of these decisions. It may be conceded that this Court has the constitutional power to render declaratory judgments "in cases of actual controversy." (See Declaratory Judgments Act of June 14, 1934 (48 Stat. 955); *cf. Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70; *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-op. Marketing Ass'n*, 276 U. S. 71; *Willing* v. *Chicago Auditorium Ass'n*, 277 U. S. 274, 289; *Piedmont & Northern Ry. Co.* v. *United States*, 280 U. S. 469, 477–478; *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace*, 288 U. S. 249; *Alabama* v. *Arizona*, 291 U. S. 286, 291. But the Declaratory Judgments Act "does not purport to alter the character of the controversies which are the subject of the judicial power under the Constitution." *United States* v. *West Virginia*, *supra*.

The Declaratory Judgments Act can be invoked only for the determination of a controversy which is clearly justiciable. It cannot authorize the granting of an advisory decree upon "an uncertain or hypothetical state of facts." (See *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Wallace, supra* at 262.) Assuming that the injury may not need to appear immediately imminent, it must, none the less, clearly appear that complainants are "presently threatened" (see *New Jersey* v. *Sargent, supra* at 341) with certain and special injury, as where the statute clearly imposes some tax or regulation upon the litigant. (*Cf. Nashville, etc. Ry.* v. *Wallace, supra.*) This requisite has always been the essence of the right to contest the constitutionality of legislation and is the factor which makes such a contest constitutionally justiciable. (See *Frothingham* v. *Mellon,* 262 U. S. 447; *Marye* v. *Parsons,* 114 U. S. 325; *New Jersey* v. *Sargent, supra; Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 186; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 180, 181; *Yazoo & Mississippi R. R. Co.* v. *Jackson Vinegar Co.,* 226 U. S. 217; *First National Bank* v. *Albright,* 208 U. S. 548.)

Aside from the prematurity and uncertainty of the complaints presented as the basis for a declaratory decree in this case, there is still a more conclusive reason for denying the decree. The essence of the right to bring a stockholder's suit is that the stockholder will suffer certain and irreparable

injury if the suit is not brought; that he has exhausted all the means within his reach to obtain redress of his grievances through corporate action; and that he is unable to secure corporate action because of fraud, gross negligence, or breach of trust on the part of the corporate management. (See *Hawes* v. *Oakland*, 104 U. S. 450; *Corbus* v. *Gold Mining Co.*, 187 U. S. 455, and other cases cited, *supra* at 50.) These requirements are obviously inconsistent with a right to secure relief in advance of immediately threatened injury. Until after the expiration of the contract of January 4, 1934, no one can assert that the management of the Alabama Power Company will not take the proper measures to protect any rights the corporation may have in regard to future competition. The occasion and the time for seeking a declaratory decree on possible future invasion of the corporation's rights must necessarily be left to the judgment and discretion of the corporate management. It is significant that no case has been found where a stockholder, suing in a representative capacity and asserting a cause of action on behalf of the corporation, has sought a declaratory decree.

The *Frost case*, 278 U. S. 515, upon which petitioners so heavily rely in support of their contention that they may complain of competition, clearly has no application to the instant case (see *supra* at 161). It is sufficient to note here that there is no suggestion in that opinion that a *stockholder* could

maintain a suit such as the corporation was permitted to maintain there. Under the circumstances of the instant case, such a suit is clearly of the type that is within the discretion of the corporate management. *Cf. Corbus* v. *Gold Mining Co., supra; Hawes* v. *Oakland, supra; Samuel* v. *Holladay,* Fed. Cas. No. 12,288, 21 Fed. Cas. 306, 311, 312 (D. C. Kan.); *United Copper Securities Co.* v. *Amalgamated Copper Co.,* 244 U. S. 261; *Fleitmann* v. *Welsbach Co.,* 240 U. S. 27. The management of the Alabama Power Company exercised its discretion for the present by making the contract of January 4, 1934. Until the expiration of this contract, it cannot be assumed that there will be any abandonment or abuse of discretion.

In its opinion on the motion to dismiss the bill of complaint, the District Court recognized the pertinence of these principles and specifically ruled that the right of the stockholders to maintain the suit was dependent "on a showing that the contracts with the Alabama Power Company were *ultra vires* or illegal" (R. 289, 290). The District Court further ruled that the relief to be accorded to petitioners should extend "no further than that the corporation be freed from the obligation of the claimed *ultra vires* or illegal transaction * * *. No other relief prayed for in the bill would be appropriate to plaintiffs" (R. 291). The Circuit Court of Appeals similarly refused to grant a declaratory decree (R. 1310).

Even if the above considerations do not absolutely preclude the granting of a declaratory decree, it is submitted that the courts below exercised their discretion with proper caution in refusing to grant the decree. This Court has undoubtedly taken the lead in pointing out the dangers of a declaratory decree involving a determination of the constitutionality of legislation. No case can be found where declaratory relief was granted on the basis of such general, uncertain, and confused allegations as are made the basis of the prayer for a declaratory decree in the instant case. The entire number of declaratory decrees involving a determination of the validity of statutes in state courts is notably few. Most of such cases involved tax statutes or zoning laws. In all cases the dispute involved was definite, simple, and clear-cut, and affected the complainant in a specific manner. See Borchard, *Declaratory Judgments*, pp. 563–569.

Petitioners' bill of complaint, exclusive of the numerous exhibits and of the lengthy amending supplement asking for a declaratory decree, filled ninety-nine pages of the printed record. This bill caused continuous confusion throughout the course of the trial. The District Court limited the evidence to those issues stated in its opinion denying the motion to dismiss the bill (R. 289). In view of all the circumstances, it can hardly be said that the courts below abused their discretion in denying the declaratory decree.

As already noted, Wilson Dam has a distinct historical and constitutional background. It is also a part of a larger river improvement project long considered by Congress (*supra* at 63). The validity of that project, we submit, does not present a justiciable controversy. If this Court should, nevertheless, deem it appropriate to inquire into activities of the Authority involving other dams, the Record shows that other operations thus far undertaken by the Authority are authorized by the statute, and are pursuant to the considered plan of Congress for development of the Tennessee River for navigation (Fdg. 132, R. 1082), following the report of the Corps of Engineers of the War Department in 1930 after five years of intensive study of the river.

The Tennessee Valley Authority Act embodies a project for the development of the Tennessee River for the improvement of navigation in the Tennessee River and the control of flood waters in the Tennessee and Mississippi River basins (R. 400, 401, 774; Sections 1, 4 (j) of the Act). It is concerned with power only in so far as power is incidental to these purposes (Sections 9a, 23). Section 4 (j) reads as follows:

> Shall have power to construct such dams and reservoirs in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for

> the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines. The directors of the Authority are hereby directed to report to Congress their recommendations not later than April 1, 1936, for the unified development of the Tennessee River system.

The Record confirms the fact that in order to improve navigation on the Tennessee and to control flood waters in the Tennessee River and Mississippi River basins, it is not only useful, but it is indispensable, to construct high dams such as Wheeler and Pickwick Landing in the main stream of the Tennessee River and storage dams such as Norris on the tributaries. This was the substantially uncontroverted opinion of distinguished military and civil engineers who testified at the trial; and the District Court so found (Fdg. 146, R. 1084; Fdg. 157, R. 1087; R. 740, 774, 789, 806, 824, 846).

Wheeler Dam since 1914 has been considered an integral part of the navigation improvement of Muscle Shoals (R. 732). In the hearings on the appropriation for the completion of Wilson Dam in

1922,[53] and subsequently,[54] the desirability of Dam No. 3 (Wheeler Dam) for the completion of the improvement of the thirty-seven miles composing Muscle Shoals, which was partially accomplished by Wilson Dam, was fully considered. At the time of the passage of the Tennessee Valley Authority Act, the Corps of Engineers had initiated the construction of a lock at the Wheeler dam site and had completed plans for the dam (R. 732, 753, 754). That it is primarily a navigation and flood-control project is apparent from the fact that never since the enactment of the Federal Water Power Act has any private power company made any application to build a power dam at that site. (See H. R. Doc. No. 328, 71st Cong., 2d Sess. 13–14; Hearings before Senate Committee on Agriculture and Forestry, 69th Cong., 1st Sess. 59; 72 Cong. Rec. 6908.) Pickwick Dam similarly is a high dam of the character indispensable for both navigation and flood control

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[53] Hearings on Sundry Appropriations Bill of 1922, before Subcommittee of the House Committee on Appropriations, 67th Cong., 3d Sess. 14–18, 78–81.

[54] Hearings before the House Committee on Military Affairs, 70th Cong., 1st Sess. 90; R. 753; Sen. Rep. No. 831 (Part 2), 67th Cong., 2d Sess. 14–15. In commenting on Dam No. 3 and a project for its construction the Report reads:

"In this way the Muscle Shoals section of the Tennessee River would be permanently improved, and an obstacle removed which has always prevented the commercially successful navigation of the Tennessee River and a project would soon be completed that was begun in a small way by Congress on May 23, 1828."

purposes (Fdg. 146, R. 1084, 1085; Fdg. 157, R. 1087). While the Cove Creek (Norris) Dam is of importance to improve the value of existing government properties at Muscle Shoals by making firm the secondary power at Wilson Dam, as is apparent from Sections 17 and 18 of the Act, its special importance as a flood control and navigation measure was emphasized both in the Act (Section 18) and in the early consideration given the project.[55]

Norris Dam will substantially improve navigation on the Tennessee River and provide flood control in the following respects (Def. Ex. 35, R. 832; R. 735–737):

1. It will increase by low flow regulation the navigable depth of the river between Pickwick Landing and the mouth, a distance of over two hundred miles, from four and one-half to six feet (Def. Ex. 35, R. 832; R. 735–736).

2. It will increase the navigable depth of the river between Guntersville and Widows Bar Dam from three to four and eight-tenths feet (Def. Ex. 35, R. 832).

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[55] Sen. Rep. No. 831, Part 1, 67th Cong., 2d Sess. 33–34; Sen. Rep. No. 19, 71st Cong., 1st Sess. 10–12; Sen. Doc. No. 21, 72d Cong., 1st Sess. 5; Sen. Rep. No. 23, 73d Cong., 1st Sess. 1; H. R. Rep. No. 48, 73d Cong., 1st Sess. 8; 75 Cong. Rec. 9655; 77 Cong. Rec. 2276, 2283, 2663.

President Hoover, although disapproving S. J. Res. 49, providing for Government operation of the Muscle Shoals properties, recommended the construction by the United States of Cove Creek (Norris) Dam. Sen. Doc. No. 321, 71st Cong., 3d Sess. 8.

3. It will increase the minimum navigable depth from one foot to two and seven-tenths feet above Chattanooga (Def. Ex. 35, R. 832; R. 735–736).

4. It will provide a navigation pool extending up the Clinch River fifty-five miles, and the Powell River thirty-eight miles (Def. Ex. 37, R. 836).

5. As being constructed the reservoir at Norris Dam will provide a total of 2,900,000 acre-feet of storage that will be available for flood control (Def. Ex. 29, R. 802). 1,400,000 acre-feet of this storage is specially allocated in the design of the dam for flood storage and that amount will always be available for that purpose (R. 802).

Firm electric energy will not be continuously generated at Norris Dam. It can be generated only during portions of the year while water is being released at Norris Dam to supplement the low water in the Tennessee River for navigation (R. 441, 964).

Pickwick Landing Dam will improve navigation on the Tennessee River and provide flood control in the following respects (Def. Ex. 36, R. 834; R. 727–730):

1. Add two-tenths foot to low water depth from Pickwick to the mouth of the river, a distance of over two hundred miles (Def. Ex. 36, R. 834).

2. Provide a minimum depth of nine feet from Pickwick Landing to Wilson Dam (Def. Ex. 36, R. 834).

3. Add seven hundred cubic feet per second to low flow of the Ohio and Mississippi Rivers (Def. Ex. 36, R. 834).

4. Extend slack-water navigation eighteen miles up Bear Creek, which may become an important link in the proposed Tombigbee Canal (R. 730).

5. Make available 420,000 acre-feet of storage for flood control (Def. Ex. 36, R. 834).

Wheeler Dam will improve navigation on the Tennessee River and provide flood control in the following respects (Def. Ex. 36, R. 834; R. 727–730):

1. Increase minimum depth from the head at Wilson pool to Guntersville from three feet to nine feet (Def. Ex. 36, R. 834; R. 727).

2. Add three-tenths foot to low-water depth from Pickwick to the mouth of the river (Def. Ex. 36, R. 834).

3. Add one thousand cubic feet per second to low flow on the Ohio and Mississippi Rivers (Def. Ex. 36, R. 834).

4. Extend nine-foot slack water navigation up the Elk River for approximately twenty-eight miles (R. 730).

5. Make available 430,000 acre-feet of storage for flood control (Def. Ex. 36, R. 834).

A complete summary of the benefits of the three dams under construction is shown in Def. Ex. 37 (R. 836). The combined benefits to navigation are that the minimum general depths will be increased

from the mouth of the Tennessee River to Pickwick Landing, a distance of 207 miles, from the present depth of four and one-half feet to six and one-half feet; from Pickwick to Guntersville, over one hundred and thirty miles, from varying depths to a minimum of nine feet; from Guntersville to Chattanooga from the present depth of three feet to four and eight-tenths feet, and from Chattanooga to Knoxville from the present depth of one foot to two and seven-tenths feet. Norris Dam will provide a minimum six-foot depth on the Clinch River above the dam for a distance of fifty-five miles, and on the Powell River for thirty-eight miles. The combined benefits to flood control are that 2,250,000 acre-feet of flood-control storage will be made available, aiding the flood problem both in the Mississippi River Valley and on the Tennessee River, particularly at Chattanooga.

The general plan for Norris Dam, as it is being constructed, is that outlined by the Army Engineers in H. R. Doc. No. 328 (R. 735). Assistance in designing the dam was obtained from the Army Engineers and the Bureau of Reclamation (R. 790). The only substantial differences between the plans previously recommended and those adopted by the Authority were the specifications for flood control (R. 789, 790) and provision for two generators instead of the three contemplated by the Army Engineers (Fdg. 149, R. 1085; R. 846). There was no provision for a barge lift in the plans of the Army

Engineers (Def. Ex. 20, R. 754; R. 790), and none is provided in the present plan. Consideration has been given by the Authority to the method of handling potential navigation on the Clinch River above the dam (R. 737, 738). At the present time there is no important traffic at this point and there is no likelihood that any will develop until the lower Clinch is canalized at some indefinite time in the future (R. 737). The record shows that a satisfactory conveyor system could be provided at much less expense than a barge lift to handle such traffic as may develop at a future date (R. 737, 738).

At the time of the passage of the Tennessee Valley Authority Act, the Army Engineers had initiated the construction of a lock at the Wheeler dam site and had completed plans for the dam (R. 732, 753, 754, 440). The only difference between that design of Wheeler and the present design is that the dam as it is being constructed will have an additional height of eleven feet (Def. Ex. 17, R. 732). The additional height will materially aid navigation by extending nine feet of slack water back to the Guntersville area, an important trade point, and thereby eliminating the need for an additional low dam (Def. Ex. 17, R. 732; R. 732, 733). It will also make a nine-foot channel up the Elk River, a distance of twenty-eight miles (R. 733). All the navigation features of Wheeler Dam have been approved by the Army Engineers (R. 735). After Wheeler Dam, the site at Pickwick is the most logi-

cal improvement on the river (Fdg. 165, R. 1088; R. 731). The lock has been designed by the Army Engineers, and the dam so designed as to place the lock upon that side of the river where it is most convenient for navigation purposes rather than power (R. 863). All of the navigation features at Pickwick Dam have been approved by the Army Engineers (R. 735).[56]

The petitioners' major criticism of the program of the Authority appears to be that the dams are to be built in such a manner as to permit the generation of electric energy.

It will be recalled that there are eight existing generators at Wilson Dam (*supra* at 18). The District Court found that the Authority planned to install *two* 50,000 kw. generators at Norris Dam when completed, and *one* 32,000 kw. generating unit at Wheeler Dam (Fdg. 149, R. 1085; R. 453). It is now planned to install two units at Wheeler. It also found that the operation of the generators at Norris in certain months of the year would, by means of an interconnecting transmission line with Wilson Dam, *make continuous at Wilson Dam* some 73,000 kw. that is available there now only in seven to eight months of the year (Fdg. 51, R. 1049; R. 833; Def. Ex. 35, R. 832). By thus firming the secondary power at Wilson Dam, Norris Dam will

[56] Since the trial, construction of three other dams has been authorized by Congress (Pub. No. 260, 74th Cong., Title II). These proposed dams are integral units of the navigation and flood-control project authorized by the Act.

substantially enhance its value for national defense purposes (R. 941) pursuant to the Act (Section 18).

The cost of construction of the navigation-flood control dams can be partially defrayed by selling the incidental power (R. 406, 761, 865). The incidental power is therefore not only functionally related, but also affords economic support to the navigation project.

It was the intention of Congress that the water-power resources of the river should be conserved in every manner consistent with the primary purpose of navigation and flood control (*cf.* H. R. Rep. No. 48 on H. R. Doc. No. 5081, 73d Cong., 1st Sess.; Cong. Rep. No. 48 on H. R. Doc. No. 5081, 73d Cong., 1st Sess.).

The District Court found that it is not practicable to erect storage dams on the tributaries or high dams on the main stream without making provision for emplacements and intakes, and then to attempt later to alter such dams for the purpose of making such facilities available (Fdg. 154, R. 1086; R. 441, 824, 845). It would thus have been a gross lack of foresight to have omitted provision for such facilities. Such action would have been at variance with the entire conservation policy of the Federal Government during the last half-century (*cf.* 25 Stat. 400, 417; 37 Stat. 201, 233).

Section 23 (3) of the Tennessee Valley Authority Act expressed the intention that the improvement of the Tennessee River should include the "maximum generation of electric power *consistent with*

flood control and navigation." The amendment to the Act, Section 9a, clarified this policy and directed the board to comply with it.

The fact that the interests of navigation, flood control and power are sometimes in conflict, as petitioners assert, only serves to demonstrate the necessity of government disposition of the power.[57]

This point was succinctly described in the Sen. Rep. on S. J. Res. No. 49 (Sen. Rep. No. 19, 71st Cong., 1st Sess. 11–12):

> Under no circumstances should the Government ever permit a private corporation to build this dam [Norris] for the purpose of generating power. If it is used solely as a power-development proposition, its value in flood control and navigation will be completely destroyed. If a private corporation should build this dam, it would permit the reservoir to fill with water and remain full, so that it could get the entire amount of fall from the regular flow of the stream. When the flood waters come, they would go over the dam and do their work of destruction just the same as though the dam were not there. Instead of regulating the Tennessee

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[57] Petitioners purport to rely upon a quotation from Senator Norris to support their assertion (brief, p. 60). In the same speech from which petitioners quote out of context, Senator Norris pointed out that only through government operation could there be assurance that the interests of navigation and flood control would not be sacrificed to develop power (69 Cong. Rec. 3441). (See also 77 Cong. Rec. 2638.)

River for navigation purposes, such a dam, operated for power exclusively, would not increase the flow of the Tennessee in low water and would not decrease it in high water. On the other hand, if it were operated as a flood-control and navigation proposition, the reservoir would be emptied once every year. Its waters would be used to increase the flow of the Tennessee River when more water was desired, and the waters would be held back when the Tennessee was high and when additional water would do damage rather than bring benefits.

If the Government built the dam and operated it on a flood-control and navigation basis it would hold the waters back when the river was high and let them out when the river was low, and in this way, by the operation of Cove Creek Dam in conjunction with Dam No. 2 now owned by the Government, the value of both dams would be vastly increased and the benefit to the country would be the maximum amount of benefit from the minimum expenditure of money.

Some measure of control can be exercised over private operation under the Federal Water Power Act, although the enforcement of such operation in practice may prove impracticable (R. 822). Even more important than difficulties of operation is the fact that private interests construct dams only when and where a market for power warrants. Colonel Edgerton, Chief of the Rivers and Harbors Section of the Office of the Chief of Engineers,

and formerly Chief Engineer of the Federal Power Commission, testified that even the "controlled development of the potential power sites upon the Tennessee River by private interests would doubtless produce a disconnected series of pools which will leave stretches of the River unimproved for navigation" (R. 822; *cf.* R. 823). Spokesmen for the private power companies have confirmed this statement (Hearings before House Committee on Military Affairs, 73d Cong., 1st Sess. 121, 214).

CONCLUSION

In view of the foregoing, we respectfully submit that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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